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T H E
LAW OF NATIONS;
O R,
P R I N C I P L E S
O F T H E
LAW OF NATURE:
APPLIED TO THE CONDUCT AND AFFAIRS
O F
NATIONS AND SOVEREIGNS.

A WORK tending to Display the TRUE INTEREST OF POWERS.

BY M. DE VATTEL.

A NEW EDITION, CORRECTED.

Nihil est enim illi principi Deo, qui omnem hunc mundum regit, quod quidem in
terris fiat, acceptius, quam concilia cœtusque hominum jure sociati, quæ civitates,
appellantur.
CICERO, *Sonn. Scipion.*

TRANSLATED FROM THE FRENCH.

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P R E F A C E.

THE Law of Nations, though a subject so noble and important, has not been hitherto treated of with all the care it deserves. The greatest part of mankind have therefore only a vague, a very incomplete, and, very often, even a false notion of it. The generality of writers, and even celebrated authors, comprehend, under the name of the Law Nations, only certain maxims, and customs, that have taken place between different nations, and become obligatory, with respect to them, by their mutual consent. This is to confine, within very narrow bounds, a law so extensive in its own nature, and in which the whole human race are so intimately concerned; and thus they at the same time degrade it, by mistaking its true origin.

The Law of Nations is certainly a natural law, since the Law of Nations is not less obligatory with respect to states, or to men united in political society, than to individuals. But to form an exact knowledge of this law, it is not sufficient to know, what the Law of Nature prescribes to the individuals of the human race. The application of a rule to various subjects can no otherwise be made, but in a manner agreeable to the nature of each subject; whence there results a natural Law of Nations as a particular science, consisting in a just and rational application of the Law of Nature to the affairs and conduct of nations and sovereign princes. All those treaties, therefore, in which the Law of Nations is blended and confounded with the ordinary Law of Nature, are incapable of conveying a distinct idea, a solid knowledge of the sacred Law of Nations.

The Romans have often confounded the Law of Nations with the Law of Nature; calling the Law of Nations (*Jus Gentium*) the Law of Nature, as being generally acknowledged and adopted by all polite nations *. We know the definitions given by the emperor Justinian

* Neque vero hoc solum naturæ, id est, jure gentium, &c. *Cicer. de Offic. Lib. III. C. 5.*

of the Law of Nature; the Law of Nations, and the Civil Law. *The Law of Nature*, says he, *is that which nature teaches to all animals* * : thus he defines the Law of Nature in the most extensive sense, and not the Law of Nature peculiar to man, that flows from his rational as well as from his animal nature. *The Civil Law*, that emperor adds, *is that which each nation has established for itself, and is proper to each state or civil society. And that law, which natural reason has established among all mankind, and is equally observed by all people, is called the Law of Nations, as being a Law which all nations follow* †. In the following paragraph, the emperor seems to approach nearer to the sense we have at present given to this term. *The Law of Nations*, says he, *is common to the whole human race. The exigencies and necessities of mankind have induced all nations to constitute certain rules of right. For wars have arisen, and produced captivity and servitude, which are contrary to the Law of Nature; since originally, and by the Law of Nature, all men were born free* ‡. But what he adds, that almost all contracts, those of buying and selling, of hire, partnership, trust, and an infinite number of others, owe their origin to this law of nations: this, I say, proves, that Justinian only thought, that, according to the state and situations in which men are placed, right reason has dictated to them certain maxims of equity, so founded on the nature of things, that they have been acknowledged and admitted by all. This is still no more than the Law of Nature, suitable to all mankind.

The Romans, however, acknowledged a law obligatory to nations with respect to each other, and to this law they referred that of embassies. They had also their *Fœdial Law*, which was nothing more than the Law of Nations with respect to public treaties, and particularly to war. The *fœdials* were the interpreters, the guardians, and in some sort the priests of the public faith §.

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* Jus naturale est, quod natura omnia animalia docuit. *Instit. Lib. I. Tit. II.*

† Quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque jus civile, quasi jus proprium ipsius civitatis: quod vero naturalis ratio inter omnes homines constituit, id apud omnes peræque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utantur. *Ibid. § 1.*

‡ Jus autem gentium omni humano generi commune est, nam usu exigente & humanis necessitatibus, gentes humanæ jura quædam sibi constituerint. Bella etenim orta sunt & captivitates sequuntæ, & servitutes, quæ sunt naturali juri contrariæ. Jure enim naturali omnes homines ab initio liberi nascebantur. *Ibid. § 2.*

§ *Fœdiales*, quod fidei publicæ inter populos præerant: nam per hos fiebat, ut justum

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The moderns generally agree to confine the Law of Nations to the just regulations which ought to subsist between nations or sovereign states. They differ only in the idea they entertain of the origin of these regulations, and the foundations upon which they are established. The celebrated Grotius understands, by the Law of Nations, a law established by the common consent of the people, and he thus distinguishes it from the Law of Nature: "When several persons, in various times and places, maintain the same thing as certain; this ought to be referred to a general cause. Now in questions of this kind, the cause can only be attributed to the one or the other of these two, either a just consequence drawn from natural principles, or an universal consent. The first discovers to us the Law of Nature, and the other the Law of Nations *."

It appears, from many passages in his excellent work, that this great man had a glimpse of the truth: but as he broke up the land, if I may be allowed the expression, and investigated an important subject, much neglected before his time, it is not surprizing that his mind, overcharged by an immense variety of objects and citations which entered into his plan, he could not always acquire those distinct ideas so necessary in the sciences. Persuaded that nations, or sovereign powers, are subject to the authority of the Law of Nature, the observation of which he so frequently recommends to them; this learned man, in fact, acknowledged a natural Law of Nations, which he somewhere call the internal Law of Nations; and perhaps it will appear that he differed from us, only in his terms. But we have already observed, that in order to form this natural Law of Nations, it is not sufficient, simply to apply to nations, what the Law of Nature decides in regard to individuals. And besides, Grotius, by his very distinction, and in affecting to give the name of the *Law of Nations* only to maxims established by the consent of the people, seems to intimate, that sovereigns, with respect to each other, can only press the observation of these last maxims, reserving the in-

justum conciperetur bellum (& inde de situm) & ut fœdere fides pacis constitueretur. Ex his mittebant, antequam conciperetur, qui res repeterent: & per hos etiam nunc fit fœdus. *Varro de Ling. Lat. Lib. IV.*

* *De Jure Belli & Pacis*, translated by Barbeyrac; Preliminary Discourse, § 41.

ternal law for the direction of their own consciences. If therefore from the idea that political societies or nations live, with respect to each other, in a reciprocal independence in the state of nature, and that they are subject, as political bodies, to the Law of Nature, Grotius had moreover considered, that the law ought to be applied to these new subjects, in a manner suitable to their nature, this judicious author would have acknowledged, without difficulty, that the natural Law of Nations is a particular science; that by this law is produced even an *external* obligation between nations, independently of their volition; and that the consent of different states is only the foundation and source of a kind of particular law, called the *Arbitrary Law of Nations*.

Hobbes, in a work wherein he discovers great abilities, notwithstanding his paradoxes and detestable maxims: Hobbes, I say, was, I believe, the first who gave a distinct, though imperfect, idea of the Law of Nations. He divides the *Law of Nature*, into that of *man*, and that of *states*; and this last, according to him, is what is commonly called the Law of Nations. *The maxims*, he adds, *of each of these laws are precisely the same; but as states in some measure acquire personal property, the same law that is termed natural, when we speak of the duties of individuals, is called the Law of Nations, when applied to the entire bodies of a state or nation**. This author has well observed, that the Law of Nations is the Law of Nature applied to states or nations. But we shall see in the course of this work, that he is mistaken in imagining, that the Law of Nature can suffer no necessary change in this application; from whence he has concluded, that the maxims of the Law of Nature, and those of the Law of Nations, are precisely the same.

Puffendorff declares, *that he subscribes absolutely to this opinion espoused by Hobbes* †. He has not therefore treated separately of the Law of Nations; but has every where united it with the Law of Nature, properly so called.

* Rursus (*Lex*) Naturalis dividi potest in naturalem hominum, quæ sola obtinuit dici *Lex Naturæ*, & naturalem civitatum, quæ dici potest *Lex Gentium* vulgo autem *Jus Gentium* appellatur. Præcepta utriusque eadem sunt: sed quia civitates semel institute induunt proprietates hominum personales, lex quam loquentes de hominum singulorum officio naturalem dicimus, applicata totis civitatibus, nationibus, five gentibus vocatur *Jus Gentium*. De Civ. C. XIV. § 4.

† Puffendorff's Law of Nature and Nations, L. II. C. II. § 23.

Barbeyrac, the translator and commentator on Grotius and Puffendorf, has approached much nearer to a just idea of the Law of Nations. Though the work is in every body's hands, I shall here, for the convenience of the reader, transcribe the note of that learned translator of Grotius's Law of War and Peace, Book I. Chap. I. § 14, Note 3. "I confess, says he, that there are laws common to all nations or affairs, which ought to be observed by every nation with respect to each other; and if people call this the *Law of Nations*, they may do so with great propriety. But the consent of different people is not the foundation of those obligations, by which they are bound to observe those laws, and therefore cannot take place here in any manner, the principles and obligations of such a law, are in fact the same as those of the Law of Nature, properly so called: all the difference consists in the application made of it, varied a little on account of the difference that sometimes subsist in the manner in which societies discharge their affairs with respect to each other."

The author we have just quoted has well observed, that the rules and decisions of the Law of Nature cannot be applied merely and simply to sovereign states, and that they must necessarily suffer some changes according to the nature of the new subjects to which they are applied. But it does not appear that he has seen the full extent of this idea, since he seems not to approve of treating the Law of Nations separately from the Law of Nature, as it relates to individuals. He only praises Budæus's method, saying, "that that author had reason to shew, (in his *Elementa Philos. Pract.*) after particularly treating of the Law of Nature, the application that may be made of it, in relation to nations with respect to each other; so far, at least, as things may permit or require*." This was placing it upon a good footing. But it required more profound reflection, and more extensive views, in order to conceive the idea of a system of the Law of Nature, that was thus the law of sovereigns and of nations; to perceive the utility of such a work, and especially to be the first to execute it.

* Note 2 on Puffendorf's Law of Nature and Nations, Book II. Chap. III. § 23. I have not been able to procure Budæus's work from which I suspect that Barbeyrac has derived this idea of Law of Nations.

This glory was reserved for the baron de Wolfius: That great philosopher saw that the application of the Law of Nature to nations in a body, or to states, modified by the nature of the subjects, could not be made with precision, with clearness and solidity, without the assistance of general principles, and the leading opinions that ought to regulate them; that it is by the means of these principles alone, that we can evidently shew how, in virtue of the Law of Nature itself, the decisions of that law, with respect to individuals, ought to be changed and modified, when they are applied to states or political societies, and to form this a natural and necessary law of nations*: whence he has concluded, that it was requisite to form a particular system of the Law of Nations; and he has happily executed it. But it is just we should here insert what Wolfius himself has said in his Preface.

“ Nations, says he †, among themselves, acknowledge
 “ no other law than that which Nature herself has estab-
 “ lished; it will therefore perhaps appear superfluous
 “ to give a treatise on the Law of Nations distinct from
 “ the Law of Nature. But those who think thus, have
 “ not sufficiently studied the subject. Nations, it is true,
 “ can only be considered as so many particular persons,
 “ living together in the state of nature; and for that
 “ reason, we ought to apply to them all the duties and
 “ rights which nature prescribes to, and lays upon man-
 “ kind, as they are born naturally free, and are only
 “ bound to each other by the single knot Nature herself
 “ has tied. The law which arises from this application,
 “ and the obligation resulting from it, proceed from that
 “ immutable law founded on the nature of man; and in
 “ this manner the Law of Nations certainly belongs to
 “ the Law of Nature: it is therefore called the natural
 “ Law of Nations, with respect to its origin; and the
 “ necessary law, in relation to its obligatory force. This

* If it was not more proper to abridge, in order to avoid repetitions, and to take advantages of nations already formed and established in the minds of men; if, I say, from all these reasons, it was not more convenient to suppose here, the knowledge of the ordinary Law of Nature, in order to apply it to sovereign states; instead of speaking of that application, it would be more exact to say, that as the Law of Nature, properly so called, is the natural law of man, founded on his nature, the natural Law of Nations is the natural law of political societies, founded on the nature of those societies. But as these two methods return to the same source, I have preferred the shortest. The Law of Nature having been largely treated of, it is shorter to make simply the rational application of it to nations.

† A nation is here a sovereign state, an independent political society.

“ law

“ law is common to all nations; and that which does not
 “ respect it in its actions, violates a law common to all
 “ people.

“ But nations, or sovereign states, being moral persons, subject to the obligations and laws resulting, in
 “ virtue of the Law of Nature, from the act of association, which has formed the political body; the nature
 “ and essence of these moral persons necessarily differ in
 “ many respects, from the nature and essence of physical
 “ individuals, or the men of whom they are composed.
 “ When therefore we would apply to nations, the duties
 “ which the Law of Nature prescribes to each man in
 “ particular, and the rights it attributes to him in order
 “ that he may fulfil his duties; these rights and these
 “ duties being no other than what are agreeable to the
 “ nature of the subjects, they must necessarily suffer, in
 “ the application, a change suitable to the new subjects to
 “ which they are applied. We thus see, that the Law
 “ of Nations does not in every thing remain the same as
 “ the Law of Nature, regulating the actions of individuals. Why then may it not be treated of separately,
 “ as a law proper to nations?”

Being myself convinced of the utility of such a work, I waited with impatience for that published by M. Wolfius, and as soon as it appeared, formed the design of facilitating, for the advantage of a greater number of readers, the knowledge of the great idea it presents. The treatise wrote by the philosopher of Halle, on the Law of Nations, is dependent on all those of the same author on the philosophy of the Law of Nature. In order to read and understand it, it is necessary to have studied sixteen or seventeen volumes in quarto which preceded it. Besides, it is written in the method, and even in the form of geometrical works: obstacles which render it almost useless to the persons to whom the knowledge, and the taste of the true principles of the Law of Nations, are most important and most desirable. I thought at first that I should have had nothing farther to do, than detaching this treatise from his entire system, by rendering it independent of every thing M. Wolfius had said before, and cloathing it in a more agreeable form, more proper to afford it a reception in the polite world. I made some attempts to do this; but I soon found, that if I would
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procure readers from that order of persons for whom I designed to write, and produce any advantage from it, I ought to form a very different work from that I had before in my eye, and to begin my labours again. The method M. Wolfius has followed, has spread a dryness through his book, and has in many respects rendered it incomplete. The subjects are dispersed through it in a manner that gives great fatigue to the attention; and as the author has treated of the public universal law, in his Law of Nature, he frequently contents himself with referring to it, when in the Law of Nations he speaks of the duties of a nation towards itself.

I have therefore confined myself to drawing from M. Wolfius's work what I found best, especially with respect to definitions and general principles; but I have made use of choice in drawing them from this source, and have accommodated to my plan the materials I have taken from thence. Those who have read M. Wolfius's treatises of the Law of Nature, and the Law of Nations, will see what advantage I have made of them. Had I every where pointed out what I have borrowed, my pages would have been crowded with citations equally useless and disagreeable to the reader. It is better to acknowledge here, once for all, the obligations I am under to this great master. Though my work, as those will see who give themselves the trouble to make the comparison, be very different from his, I confess that I should never have had the assurance to enter into so vast a field, if the celebrated philosopher of Halle had not marched before me, and offered me the advantage of his light.

I have however sometimes left my guide, and opposed his sentiments: and shall here give several examples of it. M. Wolfius, drawn away, perhaps, by a crowd of writers, adopts several propositions* to treat of the nature of *patrimonial* kingdoms, without rejecting or contradicting sentiments so injurious to mankind. I do not even admit of denomination, which I find equally shocking, improper, and dangerous, both in its effects, and in the impressions it may give to sovereigns; and in this, I flatter myself, I shall obtain the suffrage of every man who has the reason and sentiments of a true citizen.

* In the Vth Part of the Law of Nature, and in the Law of Nations

M. Wölfius determines (*Jus Gent.* § 878.) that we are naturally allowed to make use of poisoned arms in war. This decision shocks me, and I am sorry to find it in the work of so great a man. Happily for the human race, it is not difficult to shew the contrary, even from M. Wölfius's principles themselves. What I have said on this subject may be seen in Book III. § 156.

From the beginning of my work, it will be found that I differ entirely from M. Wolfius, in the manner of establishing the foundations of that species of the Law of Nations, which we call *Voluntary*. M. Wolfius deduces the idea from a kind of grand Republic (*Civitatis Maxime*) instituted by Nature herself, and of which all the nations of the world are members. According to him, the *Voluntary* Law of Nations would resemble the civil law of that grand Republic. This idea does not satisfy me; and I do not find the fiction of such a republic, either very just, or solid enough to deduce the rule of a Law of Nations universally and necessarily admitted among sovereign states. I acknowledge no other natural society among nations than that which nature has established among all men. It is essential to all civil society (*Civitatis*) that each member has given up his right to the body of the society, and that it has an authority of commanding all the members, of giving them laws, and of constraining those who refuse to obey. Nothing like this can be conceived or supposed to subsist between nations. Each sovereign state pretends to be, and actually is, independent of all others. They ought all, according to M. Wolfius himself, to be considered as so many individuals who live together in the state of Nature, and acknowledge no other laws but those of Nature, or of her author. Now nature established a general society among all men when she laid them under an absolute necessity of the succours of those in their own likeness, in order to live like men; but she has not expressly imposed upon them the obligation of uniting in civil society, properly so called; and if all followed the laws of this good mother, their being subject to civil society would be of no use. 'Tis true, men being far from voluntarily observing the rules of the Law of Nature, they have had recourse to a political association, as the only proper remedy against the depravity of the multitude, as the only means of securing
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the estates of the good, and of restraining the wicked: and the Law of Nature itself approves of this establishment. But it is easy to perceive, that a civil society between nations is not so necessary as between individuals. We cannot then say that nature equally recommends it, much less, that she has prescribed it. Individuals are so made, and are capable of doing so little by themselves, that they can scarcely subsist without the succours and laws of civil society. That as soon as a considerable number of them are united under the same government, they find themselves able to supply most of their wants, and the succours of other political societies are not so necessary to them as that of individuals is to an individual. These societies have still, it is true, powerful motives for carrying on a communication and commerce with each other, and they are even obliged to it; for no man can, without good reason, refuse assistance to another man. But the Law of Nature may suffice to regulate this commerce, and this correspondence. States conduct themselves in a different manner from individuals. It is not commonly the caprice or blind impetuosity of a single person that forms the resolutions, and determines the steps of the public: they are carried on with more deliberation and circumspection: and, on difficult or important occasions, they arrange themselves, and enter into rules, by means of treaties. Let us add, that independence is ever necessary to each state, in order that it may discharge what it owes to itself and to the citizens, and conduct itself in the most convenient manner. Once more, it is sufficient that nations conform to what is required of them by the natural and general society, established among all mankind.

But, says M. Wolfius, the rigour of this law of nature cannot be always followed in the commerce and society of nations; changes must be made in it, which you can only deduce from this idea of a kind of grand republic of nations, whose laws, dictated by sound reason, and founded on necessity, will regulate those changes to be made in the natural and necessary Law of Nations, as the civil laws determine those that should be made in a state, in relation to the natural laws of individuals. I do not perceive the necessity of this consequence; and I dare promise myself to shew in this work, that all the modifications, restrictions, and, in a word, all the changes necessary to be in-

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troduced into the affairs of nations, according to the rigour of the Law of Nature, from which is formed the voluntary Law of Nations; I dare promise myself, I say, that all these changes are deduced from the natural liberty of nations, from the interest of their common safety, the nature of their mutual correspondence, their reciprocal duties, and the distinctions of the internal and external, their perfect and imperfect laws, by reasoning nearly as M. Wolfius has done, with respect to individuals, in his Treatise on the Law of Nature.

We see in this treatise, how the rules which in virtue of natural liberty ought to be admitted in the external law, do not destroy the obligation imposed on each in point of conscience, by the internal law. It is easy to apply this doctrine to nations, and to inform them, by distinguishing carefully the internal from the external law, that is, the necessary from the voluntary Law of Nations, that they are not permitted to do whatever they may be able to do with impunity, if it be not approved by the immutable laws of justice, and the voice of conscience.

Nations being equally obliged to admit among them their exceptions and modifications, produced by the rigour of the necessary law, whether it be deduced from the idea of a great republic, of which all people are supposed to be the members, or whether drawn from the sources where I propose to search for them; nothing hinders our calling the right which results from them the voluntary Law of Nations, to distinguish it from the *necessary* and *internal* Law of Nations and of conscience. Names are pretty indifferent in themselves; what is really important is carefully to distinguish these two kinds of laws, in order that we may never confound what is just and good in itself, with what is only tolerated by necessity.

The necessary and voluntary Law of Nations are then both established by nature; but each in a different manner: the first, as a sacred law, which nations and sovereigns ought to respect and follow in all their actions; the second, as a rule which the welfare and common safety obliges them to admit in their transactions with each other. The necessary law immediately proceeds from Nature; and that common mother of men recommends the observance of the voluntary Law of Nations, in consideration of the state in which nations are found with respect to each other, and for the advantage of their affairs. This
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double law, founded on certain and invariable principles, is capable of demonstration, and will be the principal subject of this work.

There is another kind of the Law of Nations, which authors call arbitrary, because it proceeds from the will or consent of nations. States, as well as individuals, may acquire rights, and contract obligations by express engagements, by pacts, and treaties: there result from these a conventional Law of Nations, peculiar to the contracting powers. Nations may also bind themselves by tacit consent: upon this is founded whatever manners have introduced among different people, and which form the customs of nations, or the Law of Nations founded on custom. It is evident that this law can impose an obligation only on those nations who have adopted these customs by long use. It is a particular law, in the same manner as the conventional law. Both derive all their force from the Law of Nature, which prescribes to nations the observation of their engagements, whether express or tacit. The same Law of Nature ought to regulate the conduct of states in relation to the treaties they conclude, and to the customs they adopt. I am obliged to confine myself to the general rules and principles which the Law of Nature furnish for the direction of sovereigns in this respect. The particulars of the different treaties, and the various customs of different people, belong to history, and not to a systematic treatise on the Law of Nations.

Such a treatise ought principally to consist, as we have already observed, in a judicious and rational application of the principles of the Law of Nature to the affairs and conduct of nations and sovereigns. The study of the Law of Nations supposes, then, a previous knowledge of the uniform Law of Nature. I suppose therefore, that my readers, to a certain degree at least, are acquainted with this knowledge. However, as we do not love to go elsewhere in search of proofs of what our author advances, I have taken care to establish, in a few words, the most important of those principles of the Law of Nature which I have applied to nations. But I have not always thought it necessary to demonstrate them, by tracing them to their primary foundations, and have sometimes contented myself with supporting them on common truths, acknowledged by every reader of integrity, without pushing the

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analysis further. It is sufficient for me to persuade, and for this purpose to advance nothing as a principle, that will not easily be admitted by every sensible man.

The Law of Nations is the law of sovereigns. It is principally for them, and for their ministers, that it ought to be written. All men are indeed interested in it; and the study of its maxims are, in a free country, proper for every citizen: but it would signify little to instruct only private persons, who are not called to the councils of nations, and who do not determine their steps. If the conductors of states, if all those who are employed in public affairs, condescended to apply seriously to the study of a science which ought to be their law and their compass, what fruits might we not expect from a good treatise on the Law of Nations! We every day perceive those of a good body of laws in civil society: the Law of Nations is as much above the civil law in its importance, as the proceedings of nations and sovereigns surpass in their consequences those of private persons.

But fatal experience too plainly proves, how little those who are at the head of affairs trouble themselves about what is right, where they hope to find their advantage. Contented with applying themselves to politics, that are often false, since they are often unjust, most of them believe they have done enough, when they have well studied them. In the mean time, we may say of states, what has been long acknowledged in regard to private persons, that there is no better and safer policy than that which is founded on virtue. Cicero, as great a master in the conduct of a state as in eloquence and philosophy, did not content himself with rejecting the vulgar maxim, that the republic could not be happily governed without committing injustice; he went so far as to establish the contrary as an invariable truth, and maintained that no one could administer the public affairs in a salutary manner, if he did not attach himself to the most exact justice*.

Providence, from time to time, gives the world kings and ministers penetrated with this great truth. Let us not lose the hope that the number of these wise conductors of nations will one day be multiplied; and while we

* Nihil est quod adhuc de republica putem dictum, & quo possim longius progredi, nisi sit confirmatum, non modo falsum esse istud, sine injuria non posse, sed hoc verissimum, sine summa justitia Rempublicam regi non posse. Cicero. *Fragment, ex Lib. de Republica.*

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wait for it, let each of us labour in his sphere, to bring on such happy times.

It is principally with a view of making those relish this work, to whom it is of the most importance that they should read and relish it, that I have sometimes joined examples to maxims; and I have been confirmed in my opinion, by the approbation of one of those ministers who are the enlightened friends of the human race, and who alone ought to enter into the councils of kings. But I have used this ornament with reserve. Without ever endeavouring to make a vain parade of erudition, I have only been willing, from time to time, to relax the mind of my reader, or to render the doctrine more sensible, by an example sometimes to shew that the practice of nations is conformable to principle; and when I have found occasion, I have endeavoured above all things, to inspire a love of virtue, by shewing it amiable, worthy of our homage, in some truly great men, and even most solidly useful, by some striking passages of history. I have taken the greatest part of my examples from modern history, as most interesting, and to avoid repeating those which Grotius, Puffendorf, and their commentators, have accumulated.

As to the rest, both of these examples and in my reasonings, I have studied to offend nobody, proposing to observe religiously the respect that is due to nations and to sovereign powers. But I have made it a still more inviolable law to respect the truth and the interest of the human race. If the base flatterers of despotic power rise up against my principles, I shall have on my side the virtuous man, the friend of the laws, the man of probity, and the true citizen.

I should have chosen to be silent, could I not have followed in my writings the light of conscience. But nothing has restrained my pen, and I am incapable of prostituting it to flattery. I was born in a country of which liberty is the soul, the treasure, and the fundamental law: I may also, from my birth, be the friend of all nations. These happy circumstances have encouraged me to attempt the rendering myself useful to mankind by this work. I am sensible of the weakness of my abilities, and my talents; I have seen that I have undertaken a painful task; but I shall be satisfied if readers worthy of esteem shall discover in my labours, the honest man, and the citizen.

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THE L A W OF N A T I O N S.

PRELIMINARIES.

Idea and general Principles of the Law of Nations.

NATIONS or states are bodies politic, societies of men united together to procure their mutual safety and advantage by means of their union. § 1.
What is meant by a nation or state.

Such a society has its affairs and interests, it deliberates and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. § 2.
It is a moral person.

To establish on a solid foundation the obligations and laws of nations, is the design of this work. The law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it. § 3.
Definition of the law of nations.

In this treatise it will appear, in what manner states, as such, ought to regulate all their actions. We shall examine the obligations of a people, both with regard to themselves and to others, and by that means discover the laws resulting from those obligations. For the law being nothing more than the power of doing whatever is morally possible, that is, whatever is of advantage, and consistent with duty; it is evident that the law is derived from duty, or from passive obligation; the obligation we are under to act in such a manner. It is therefore necessary that a nation should inform itself of its obligations, not only to avoid the violation of its duty; but also to be able to know with certainty its own rights, or what it may lawfully require from others.

Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, lived together in the state of nature, nations, or sovereign states, are to be considered as so many free persons living together in the state of nature. § 4.
In what light nations or states ought to be considered.

It

It is evident from the law of nature, that all men being naturally free and independent, they cannot lose these blessings without their own consent. Citizens cannot enjoy them fully and absolutely in any state, because they have surrendered a part of these privileges to the sovereign. But the body of the nation, the state, remains absolutely free and independent with respect to all men, or to foreign nations, while it does not voluntarily submit to them.

§ 5.
To what
laws na-
tions are
subject.

Men being subject to the laws of nature, and their union in civil society not being sufficient to free them from the obligation of observing these laws, since by this union they do not cease to be men; the entire nation, whose common will is only the result of the united wills of the citizens, remains subject to the laws of nature, and is obliged to respect them in all its proceedings. And since the law arises from the obligation, as we have just observed (§ 3.) the nation has also the same laws that nature has given to men, for the performance of their duty.

§ 6.
In what the
law of na-
tions origi-
nally con-
sists.

We must then apply to nations the rules of the law of nature, in order to discover what are their obligations, and what are their laws; consequently the *law of nations* is originally no more than the *law of nature* applied to nations. But as the application of a rule cannot be just and reasonable, if it be not made in a manner suitable to the subject; we are not to believe that the law of nations is precisely, and in every case, the same as the law of nature, the subjects of them only excepted; so that we need only substitute nations for individuals. A state or civil society is a subject very different from an individual of a human race: whence, in many cases, there follow, in virtue of the laws of nature themselves, very different obligations and rights; for the same general rule applied to two subjects cannot produce exactly the same decisions, when the subjects are different; since a particular rule that is very just with respect to one subject, is not applicable to another subject of a very different nature. There are then many cases in which the law of nature does not determine between state and state, as it would between man and man. We must therefore know how to accommodate the application of it to different subjects; and it is the art of applying it with a justness founded on right reason, that renders the law of nations a distinct science.

§ 7.
Definition
of the ne-
cessary law
of nations.

We call that the *necessary law of nations* that consists in the application of the law of nature to nations. It is *necessary*, because nations are absolutely obliged to observe it. This law contains the precepts, prescribed by the law of nature to states, to whom that law is not less obligatory than to individuals; because states are composed of men, their resolutions are taken by men, and the law of nature is obligatory to all men, under whatever relation they act. This is the law which Grotius, and those who follow him, call the *internal law of nations*, on account of its being obligatory to nations in point of conscience. Several term it the *natural law of nations*.

Since

Since then the *necessary law of nations* consists in the application of the law of nature to states, and is immutable, as being founded on the nature of things, and in particular on the nature of man; it follows, that the necessary law of nations is immutable.

Whence, as this law is immutable, and the obligations that arise from it necessary and indispensable; nations can neither make any changes in it by their conventions, dispense with it themselves, nor reciprocally, with respect to each other.

This is the principle by which we may distinguish lawful conventions or treaties, from those that are not lawful; and innocent and rational customs from those that are unjust and censurable.

There are things just, and permitted by the necessary law of nations, which states may agree to establish between each other, and which they may consecrate and strengthen by manners and customs. There are also those that are indifferent, which different states may agree to establish at pleasure by treaties, or introduce such custom or such practice as they shall think proper. But all the treaties and all the customs contrary to what the necessary law of nations prescribes, or that are such as it forbids, are unlawful. We shall hereafter find that they are not always such as are agreeable to the internal law of nature or of conscience, and that for reasons which shall be given in their proper place, these conventions, or these treaties, are only valid by the external law. Nations being free and independent, though the actions of one of them are illegal and are condemned by the law of conscience, the others are obliged to bear with them, when those actions do not injure their perfect rights. The liberty of one nation will not remain entire, if the others arrogate to themselves an inspection into the rules of its conduct. For this must be contrary to the law of nature, which declares every nation free and independent of others.

Man is so formed by nature, that he cannot suffer by himself, and he necessarily stands in need of the assistance and support of creatures like himself, to preserve and perfect his own being, and to enjoy the life of a rational animal. This is sufficiently proved by experience. We have instances of men nourished among the bears, who had neither a language, nor the use of reason, and like the beasts, had only the sensual powers. We see moreover that nature has refused men the natural strength and arms with which she has furnished other animals, giving them, instead of these advantages, those of reason and speech, or at least the power of acquiring them by a commerce with their fellow beings. Speech enables them to converse with each other, and enables them to extend, and raise to perfection, their reason and knowledge; and being thus rendered intelligent, they find a thousand methods of preserving themselves, and supplying their wants. Every one also becomes sensible that he can neither live happily, nor improve himself without the assistance and conversation of others. Since then nature has thus formed mankind, it is a manifest proof that

It is immutable.

§ 9.
Nations can neither change it, nor dispense with the obligations that flow from it.

§ 10.
Of the society established by nature.

the designed they should converse with one another, and grant to each their mutual aid and assistance.

From hence is deduced that natural society established among men. The general law of society is, that each should do for others whatever their necessities require, and they are capable of doing, without neglecting what they owe to themselves: a law which all men ought to observe, in order to live agreeably to their nature, and in conformity to the views of their common Creator: a law that our own safety, our happiness, our most precious advantages, ought to render sacred to every one of us. Such is the general obligation that binds us to the observance of our duty: let us fulfil it with care, if we could wisely endeavour to promote our highest happiness.

It is easy to conceive the felicity the world would enjoy, were all men willing to observe the rule that has been just laid down. On the contrary, if every man would think solely and immediately for himself, and would do nothing for others, all mankind would be very unhappy. Let us then endeavour to promote the happiness of all; thus all will endeavour to promote ours, and we shall establish our felicity on the most solid foundation.

§ 11.
And be-
tween na-
tions.

The universal society of the human race being an institution of nature, that is; a necessary consequence of the nature of man, all men, in whatsoever station they are placed, are obliged to cultivate and discharge its duties. They cannot dispense with it by any convention, or private association. When they unite in civil society, in order to form a separate state, or nation, they may justly enter into particular engagements towards those with whom they associate themselves; but they are still under the obligation of performing their duty to the rest of the human species. All the difference consists in this, that having agreed to act in common, and having referred their rights, and submitted their will, to the body of their society, in every thing that concerns their common welfare; from thence forward that body, that state, and its conductors, are to fulfil the duties of humanity towards strangers, in every thing that no longer depends on the liberty of private persons; and the state is particularly to observe them with the other states. We have already seen (§ 5.) that men, united in society, remain subject to the obligations imposed upon them by human nature: that society, considered as a moral person, from its having an understanding, volition, and strength peculiar to itself, is therefore obliged to live with other societies, or states, as a man was obliged, before these establishments, to live with other men, that is, according to the laws of the natural society established among the human race; observing the exceptions that may arise from the difference of the subjects.

§ 12.
What is the
end of this
society of
nations.

As the end of the natural society established between all mankind, is their lending their mutual assistance towards their own perfection and that of the state; and as the nations considered as so many free persons who live together in a state of nature, are obliged to cultivate between each other this intercourse of humanity;

nity; the end of the great society established by nature between all nations is also a mutual assistance for the improvement of themselves and their state.

The first general law, which the very end of the society of nations discovers, is, that each nation ought to contribute all in its power to the happiness and perfection of others.

But the duty towards ourselves, having incontestibly the advantage over our duty with respect to others, a nation ought in the first place, preferably to all other considerations, to do whatever it can to promote its own happiness and perfection. (I say whatever it can, not only in a *physical*, but in a *moral* sense, that is, what it can do lawfully, and consistently with justice and integrity.) When therefore it cannot contribute to the welfare of another, without doing an essential injury to itself, the obligation ceases on this particular occasion, and the nation is considered as under an impossibility of performing that office.

Nations being free and independent of each other, in the same manner as men are naturally free and independent, the second general law of their society is, that each nation ought to be left in the peaceable enjoyment of that liberty it has derived from nature. The natural society of nations cannot subsist, if the rights each has received from nature, are not respected. None would willingly renounce its liberty; it would rather break off all commerce with those that should attempt to violate it.

From this liberty and independence it follows, that every nation is to judge of what its conscience demands, of what it can or cannot do, of what is proper or improper to be done; and consequently to examine and determine whether it can perform any office for another, without being wanting in what it owes to itself. In all cases then, where a nation has the liberty of judging what its duty requires, another cannot oblige it to act in such or such a manner. For the attempting this would be doing an injury to the liberty of nations. A right to offer constraint to a free person, can only be invested in us, in such cases where that person is bound to perform some particular thing for us, or from a particular reason that does not depend on his judgment; or, in a word, where we have a complete authority over him.

In order perfectly to understand this, it is necessary to observe, that the obligation, and the right correspondent to it, or flowing from it, is distinguished into *external* and *internal*. The obligation is *internal*, as it binds the conscience, and as it comprehends the rules of our duty: it is *external*, as it is considered relatively to other men, and as it produces some right between them. The internal obligation is always the same in nature, though it varies in degree: but the external obligation is divided into *perfect* and *imperfect*, and the right that results from it is also *perfect* and *imperfect*. The *perfect right* is that to which is joined the right of constraining those who refuse to fulfil the obligation resulting from it; and the *imperfect right* is that unaccompanied

§ 13.

The general obligation it imposes.

§ 14.

The explanation of this observation.

§ 15.

The second general law is the liberty and independence of nations.

§ 16.

The effect of this liberty.

§ 17.

Distinctions between the obligations and laws internal and external, perfect and imperfect.

accompanied by this right of constraint. The *perfect obligation* is that which produces the right of constraint; the *imperfect* gives another only a right to demand.

It may now be comprehended without difficulty, why the right is always imperfect, when the obligation which answers to it depends on the judgment of another. For in this case, was there a right of constraint, it would no longer depend on the other to resolve what ought to be done in order to obey the laws of conscience. Our obligation is always imperfect in relation to another, when the decision of what we have to do is reserved to ourselves, and this decision is reserved to us on all occasions where we have a right to be free.

§ 18.
The equality of nations.

Since men are naturally equal, and their rights and obligations are the same, as equally proceeding from nature, nations composed of men, considered as so many free persons living together in the state of nature, are naturally equal, and receive from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is as much a sovereign state as the most powerful kingdom.

§ 19.
An effect of this equality.

From a necessary consequence of this equality, what is permitted to one nation is permitted to all; and what is not permitted to one is not permitted to any other.

§ 20.
Each has authority over its own actions when they do not injure the perfect rights of others.

A nation has then a right to perform what actions it thinks fit, both when they do not concern the proper and perfect rights of any other, and when it is bound to it only by an *internal*, without any *perfect external* obligation, and it is under no *external perfect* obligation. If it makes an ill use of its liberty, it offends; but others ought to suffer it to do so, having no right to command it to do otherwise.

§ 21.
The foundation of the voluntary law of nations.

Nations being free, independent, and equal, and having a right to judge according to the dictates of conscience, of what is to be done in order to fulfil its duties; the effect of all this is, the producing, at least externally, and among men, a perfect equality of rights between nations, in the administration of their affairs, and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment; so that what is permitted in one, is also permitted in the other, and they ought to be considered in human society as having an equal right.

Every one in fact pretends to have justice on his side in the differences that may arise, and neither one nor the other ought to interest itself in forming a judgment of the disputes of other nations. The nation that has acted wrong, has offended against its conscience; but as it may do whatever it has a right to perform, it cannot be accused of violating the laws of society.

It is therefore necessary, on many occasions, that nations should suffer certain things to be done, that are very unjust and blameable in their own nature, because they cannot oppose it by open force, without violating the liberty of some particular state, and

and destroying the foundation of natural society. And since they are obliged to cultivate that society, it is rightly presumed, that all nations have consented to the principle we have just established. The rules that flow from this principle, form what Mr. Wolfe calls *the voluntary law of nations*; and nothing prevents our using the same term, though we have imagined that we ought to deviate from that great man in our manner of establishing the foundation of those laws.

The laws of natural society are of such importance to the safety of all states, that if they accustom themselves to trample them under their feet, no people can flatter themselves with the hopes of self-preservation, and of enjoying tranquillity at home, whatever wise, just, and moderate measures they may pursue. Now all men and all states have a perfect right to those things that are necessary for their preservation; since this right is equivalent to an indispensable obligation. All nations have then a right to repel by force, what openly violates the laws of the society which nature has established among them, or that directly attacks the welfare and safety of that society.

But care must be taken not to extend this law to the prejudice of the liberty of nations. All are free and independent, but obliged to preserve the laws of society, which nature has established among them; and so far obliged, that others have a right to repress that which violates these laws; all together have not therefore any authority over the conduct of any one, farther than the interest of the natural society is concerned. The general and common law of nations, with respect to the conduct of all sovereign states, ought to be measured by the end of the association that subsists between them.

The several engagements into which nations may enter, produce a new kind of the law of nations, called *conventional*, or of *treaties*. As it is evident that a treaty binds only the contracting parties, the conventional law of nations is not an universal but a particular law. All that can be done on this subject in a treatise on the law of nations, is therefore to give the general rules that ought to be observed by nations in relation to their treaties. The particulars of the different agreements, relate to what passes between certain nations; but the law and the obligations resulting from it, is matter of fact, and belongs to history.

Certain maxims and customs consecrated by long use, and observed by nations between each other as a kind of law, form the *customary law of nations*, or the *custom of nations*. This law is founded on a tacit consent, or if you will, on a tacit convention of the nations that observe it with respect to each other. Whence it appears, that it is only binding to those nations that have adopted it, and that it is not universal, any more than *conventional laws*. It must be here also observed of this *customary law*, that the particulars relating to it, do not belong to a systematic treatise on the law of nations, but that we ought to confine ourselves

§ 22.

The law of nations against the infractors of the law of nations.

§ 23.

The rule of this law.

§ 24.

The conventional law of nations, or the law of treaties.

§ 25.

The customary law of nations.

selves to the giving a general theory of it; that is, to the rules which here ought to be observed, as well with respect to its effects, as in relation to the matter itself: and in this last respect, these rules will serve to distinguish the lawful and innocent customs from those that are unjust and illegal.

§ 26.
The general rule of this law.

When a custom is generally established, either between all the polite nations in the world, or only between those of a certain continent, as of Europe, for example, or those who have a more frequent correspondence; if that custom is in its own nature indifferent, and much more if it be a wise and useful one, it ought to be obligatory to all those nations who are considered as having given their consent to it. And they are bound to observe it with respect to each other, while they have not expressly declared that they will not adhere to it. But if that custom contains any thing unjust or illegal, it is of no force; and every nation is under an obligation to abandon it, nothing being able to oblige or permit a nation to violate a natural law.

§ 27.
Of the positive law of nations.

These three kinds of the law of nations, *voluntary*, *conventional*, and *customary*, together compose the *positive law of nations*. For they all proceed from the volition of nations; the *voluntary law*, from their presumed consent; the *conventional law*, from an express consent; and the *customary law*, from a tacit consent: and as there can be no other manner of deducing any law from the will of nations, there are only these three kinds of the *positive law of nations*.

We have carefully distinguished from them the *natural* or *necessary* law of nations; without, however, treating of them separately. But after having established, with respect to each, what the law necessarily prescribes, we shall at length add, how and in what manner the decisions of the voluntary law ought to be modified, or, which is the same thing, in other terms, we shall explain, how, in virtue of the liberty of nations, and the rules of natural society, the *external law* that ought to be observed among them, differs in certain instances from the maxims of the *internal law*, which is always obligatory with respect to conscience. As to the laws introduced by treaties, or by custom, there is no room to fear that any one will confound them with the natural law of nations. They form that species of the law of nations, which authors have distinguished by the name of *arbitrary*.

§ 28.
A general maxim with regard to the use of the necessary and voluntary law.

To give at present a general direction, in relation to the distinction between *necessary* and *voluntary laws*, we shall observe, that the *necessary law* being always obligatory with respect to conscience, a nation ought never to lose sight of it, when it deliberates on the part it is to take, in order to fulfil its duty; but when it is requisite to examine what it may require from other states, it ought to consult the *voluntary law*, the maxims of which are consecrated to the safety and advantage of universal society.

THE LAW OF NATIONS.

BOOK I.

Of Nations considered in themselves,

CHAP. I.

Of Nations or sovereign States.

A Nation or a state is, as has been said at the beginning of this work, a body politic, or a society of men united together to promote their mutual safety and advantage by means of their union. § 1.
Of the state
of sovereignty.

From the very design that induces a number of men to form a society that has its common interests, and ought to act in concert, it is necessary that there should be established a public authority, to order and direct what ought to be done by each in relation to the end of the association. This political authority is the sovereignty, and he, or they who are invested with it are the sovereign.

It is evident from the very act of the civil or political association, that each citizen subjects himself to the authority of the entire body, in every thing that relates to the common welfare. The authority of all over each member, therefore essentially belongs to the body politic, or to the states; but the exercise of that authority may be placed in different hands according as the society shall ordain. § 2.
The authority of the body politic over the members.

B

If

§ 3.
Of the several kinds
of government.

If the body of the nation keeps in its own hands the empire, or the right of command, it is a popular government, a *democracy*; if it refers it to a certain number of citizens, to a senate, it establishes a republic, an *aristocracy*; in short, if it confides the government to a single person, the state becomes a *monarchy*.

These three kinds of government may be variously combined and modified. We shall not here enter into the particulars; this subject belonging to the *public universal law*: it is sufficient, in this work, to establish the general principles necessary for the decision of those disputes that may arise between nations.

§ 4.
What are
sovereign
states.

Every nation that governs itself, under what form soever, without any dependence on foreign power, is a *sovereign state*. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient if it be really sovereign and independent; that is, it must govern itself by its own authority and laws.

§ 5.
Of states
bound by
unequal
alliance.

We ought therefore to reckon in the number of sovereigns, those states that have bound themselves to another more powerful, by an *unequal alliance*, in which, as Aristotle says, to the more powerful is given more honour, and to the weaker, more assistance.

The conditions of these unequal alliances may be infinitely varied. But whatever they are, provided the inferior ally reserves to itself the sovereignty, or the right of governing its own body, it ought to be considered as an independent state, that keeps up correspondence with others under the authority of the law of nations.

§ 6.
Or by treaties of
protection.

Consequently a weak state that, in order to provide for its safety, places itself under the protection of a more powerful one, and from gratitude, enters into engagements to perform several offices equivalent to that protection, without in the least stripping itself of the right of government and sovereignty; that state, I say, does not cease, on this account, to be placed among the sovereigns who acknowledge no other law, than that of nations.

§ 7.
Of tributary
states.

There is no more difficulty with respect to tributary states; for though tribute paid to a foreign power, in some degree diminishes the dignity of these states, from its being a confession of their weakness; yet it suffers their sovereignty to subsist entire. The custom of paying tribute was formerly very common; the weakest purchasing by that means, of him who was more powerful, a freedom from vexations; or securing at this expence, his protection, without ceasing to be sovereigns.

§ 8.
Of feudatory
states.

The Germanic nations have introduced another custom, that of requiring homage from a state either vanquished, or too weak to make resistance. Sometimes a prince has even given sovereignties in fief, and sovereigns have voluntarily rendered themselves feudatories to others.

When

When the homage leaves independency and sovereign authority in the administration of the state, and only means certain duties to the lord of the fief, or even a mere honorary acknowledgment, it does not prevent the state of the feudatory prince being strictly sovereign. The king of Naples pays homage for his kingdom to the pope; and yet is nevertheless reckoned among the principal sovereigns of Europe.

Two sovereign states may also be subject to the same prince, without any dependence on each other, and each may retain all its national rights free and sovereign; the king of Prussia is sovereign prince of Neufchatel in Switzerland, without that principality being in any manner united to his other dominions; so that the Neufchatelians, in virtue of their franchises, may serve a foreign power at war with the king of Prussia, provided that the war be not on account of that principality.

In short, several sovereign and independent states may unite themselves together by a perpetual confederacy, without each in particular ceasing to be a perfect state. They will form together a federal republic: the deliberations in common will offer no violence to the sovereignty of each member, though they may, in certain respects, put some constraint on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent, when he is obliged to fulfil the engagements into which he has very willingly entered.

Such were formerly the cities of Greece; such are at present the Seven United Provinces of the Netherlands, and such the members of the Helvetic body.

But a people, that has passed under the dominion of another, can no longer form a state, and in a direct manner make use of the law of nations. Such were the people and kingdoms which the Romans rendered subject to their empire; the most, even of those whom they honoured with the name of friends and allies, no longer formed states. Within themselves they were governed by their own laws and magistrates; but without, they were in every thing obliged to follow the orders of Rome; they dared not of themselves make either war or an alliance, and could not treat with nations.

The law of nations is the law of sovereigns: states free and independent are moral persons, and their laws and obligations we are to establish in this treatise.

C H A P. II.

General Principles of the Duties of a Nation towards itself.

IF the rights of a nation spring from its obligations, it is principally from those that relate to itself. Its duties towards others, also depend very much on those towards itself, by which a nation ought to regulate and measure its conduct. As we are

then to treat of the obligations and rights of nations, order demands that we should begin with establishing what each owes to its own welfare.

The general and fundamental rule of the duties towards ourselves is, that every moral being ought to live in a manner conformable to nature, *naturæ convenienter vivere*. A nation is a being determined by its essential properties, that has its own nature, and can act in conformity to it. There are then the actions of a nation as such, wherein it is concerned in its national character, and which are either suitable or opposite to what constitutes a nation; so that it is not a matter of indifference whether it performs some of these actions, and emits others. In this respect the Law of Nature prescribes its duties. We shall see in this first book, what conduct a nation ought to observe, in order that it may not be wanting to itself. But we shall first sketch out a general idea of this subject.

§ 14.
Of the preservation and perfection of a nation.

He who no longer exists, can have no duties to perform: a moral being is charged with obligations to himself with a view to his perfection and happiness: for to preserve and to perfect his own nature is the sum of all his duties to himself.

The preservation of a nation consists in the duration of the political association of which it is formed. If a period is put to this association, the nation or state no longer subsists, though the individuals that composed it, still exist.

The Perfection of a nation is found in what renders it capable of obtaining the end of civil society; and a nation is in a perfect state, when nothing necessary is wanting to arrive at that end. We know that the perfection of a thing in general consists, in a perfect concord of all that constitutes the thing what it is, tending to the same end. A nation being a multitude of men united together in civil society, if in that multitude all conspire to obtain the end proposed in forming a civil society, the nation is perfect; and it is more or less so, according as it approaches more or less to that perfect agreement. In the same manner its external state will be more or less perfect, according as it concurs with the intrinsic perfection of the nation.

§ 15.
What is the end of civil society.

The End of civil society is procuring for the citizens whatever their necessities require, the conveniencies and accommodation of life, and, in general, whatever constitutes happiness; with the peaceful possession of property, a method of obtaining justice with security; and, in short, a mutual defence against all violence from without.

It is now easy to form a just idea of the perfection of a state or nation, for every thing must conspire to promote these ends.

§ 16.
A nation is under an obligation to preserve itself.

In the act of association, in virtue of which a multitude of men form together a state or nation, each individual has entered into engagements with all, to procure the common welfare; and all have entered into engagements with each individual to facilitate for him the means of supplying his necessities, and to protect and defend him. It is manifest that these reciprocal engagements can

no otherwise be fulfilled than by maintaining the political association. The entire nation is then obliged to maintain that association; and as in its duration the preservation of the nation consists, it follows from thence that every nation is obliged to perform the duty of self-preservation.

This obligation, so natural to the creatures of God, is not derived to nations immediately from Nature, but from the agreement by which civil society is formed; it is therefore not absolute, but conditional; that is, it supposes an human act, a part or agreement of society: and as the parts may be dissolved by common consent of the parties, if the individuals that compose a nation unanimously consent to break the knot that binds them, they may be permitted to do it, and thus to destroy the state or nation; but they doubtless innocently do it, if they take this step without just and weighty reasons; for civil societies are approved by the Law of Nature, which recommends them to man, as the true means of supplying all their wants, and of advancing effectually towards their proper perfection. Moreover civil society is so useful, so necessary even to all citizens, that it may well be considered as morally impossible for them to consent unanimously to break it without necessity. But what citizens may, or ought to do, what the majority of them may resolve in certain cases of necessity, or in pressing exigencies; are questions that will be treated of elsewhere: they cannot be solidly determined without some principles, which we have not yet established. It is sufficient for the present that we have in general proved, that while the political society subsists, the whole nation is obliged to endeavour to preserve it.

If a nation is obliged to preserve itself, it is not less obliged carefully to preserve all its members. The nation owes this to itself; since the loss of even one of its members weakens it, and is injurious to its own preservations. It owes this also to the members in particular in consequence of the very act of association; for those who compose a nation are united for their defence and common advantage; and none can justly be deprived of this union, and of the advantages which flow from it, while he on his side fulfils the conditions.

The body of a nation cannot then abandon a province, a town, or even a particular person who has done his part, unless obliged to it from necessity, or unless it is made necessary by the strongest reasons founded on the public safety.

Since then a nation is obliged to preserve itself, it has a right to every thing necessary for its preservation. For the Law of Nature gives us a right to every thing, without which we could not fulfil our obligation; otherwise it would oblige us to do impossibilities; or rather would contradict itself in prescribing a duty, and prohibiting at the same time the only means of fulfilling it. It will doubtless be here understood, that these means ought not to be unjust in themselves, and absolutely forbidden by the Law of Nature. As it is impossible that it should ever permit the use

§. 17.
And to preserve its members.

§. 18.
A nation has a right to every thing necessary for its preservation.

of such means ; if on a particular occasion no other present themselves for fulfilling a general obligation, the obligation ought to cease in that particular instance, as impossible, and consequently void.

§ 19.
It ought to avoid every thing that might occasion its destruction.

§ 20.
Of its right to every thing that may promote it.

§ 21.
A nation ought to perfect itself and the state.

By an evident consequence from what has been said, a nation ought carefully to avoid, as much as possible, whatever may cause its destruction, or that of the state, which is the same thing.

A nation or state has a right to every thing that can secure it from such a threatening danger, and to keep at a distance whatever is capable of causing its ruin ; and that from the very same reasons that establish its right to the things necessary to its preservation.

The second general duty of a nation towards itself, is to endeavour after its perfection and that of its state. It is this double perfection that renders a nation capable of attaining the end of civil society : it would be absurd to unite in society, and yet not to endeavour to promote the end of that union.

Here the entire body of the nation, and each citizen in particular find themselves bound by a double obligation, the one immediately proceeding from nature, and the other resulting from their reciprocal engagements. Nature lays an obligation upon all mankind to labour after their own perfection, and by that means to labour after that of civil society, which could not fail of being very flourishing, were it composed of none but good citizens. But man, finding in a well regulated society the most powerful succours to enable him to fulfil the task which Nature imposes upon him in relation to himself, to induce him to become better, and consequently more happy ; he is doubtless obliged to contribute all in his power to render that society more perfect.

All the citizens who form a political society, reciprocally engage to advance the common welfare, and to promote as much as they can, the advantage of each member. Since then the perfection of the society is what renders it proper to secure equally the happiness of the body and that of the members ; to endeavour after this perfection is the grand object of the engagements and duties of a citizen. This is more particularly the duty of the whole body in all their deliberations in common, and in every thing they do as a body.

§ 22.
And to avoid every thing contrary to its perfection.

§ 23.
The rights it obtains from these obligations.

§ 24.
Examples.

A nation therefore ought to prevent, and carefully to avoid whatever may hinder the perfection of the people, and that of the state, or retard the progress either of the one or the other.

We may then conclude, as we have done above in regard to the preservation of a state, (§ 18.) that a nation has a right to every thing without which it cannot obtain the perfection of the members and of the state, or prevent and repel whatever is contrary to this double perfection.

The English furnish us with an example of this kind highly worthy of attention. That illustrious nation distinguishes itself in a glorious manner by its application to every thing that can render the state the most flourishing. An admirable constitution there

there places every citizen in a situation that enables him to contribute to this great end, and every-where diffuses a spirit of true patriotism, which is zealously employed for the public welfare. We there see mere citizens form considerable enterprizes, in order to promote the glory and welfare of the nation. And while a bad prince would be abridged of his power, a king, endowed with wisdom and moderation, finds the most powerful succours to give success to his great designs. The nobles and the representatives of the people form a band of confidence between the monarch and the nation, and concur with him in every thing that concerns the public welfare; ease him in part of the burden of government; confirm his power, and render him an obedience the more perfect, as it is voluntary. Every good citizen sees that the strength of the state is really the welfare of all, and not that of a single person. Happy constitution! which they did not suddenly obtain; it has cost rivers of blood; but they have not purchased it too dear. May luxury, that pest so fatal to the manly and patriotic virtues, that minister of corruption so dangerous to liberty, never overthrow a monument that does so much honour to human nature; a monument capable of teaching kings, how glorious it is to rule over a free people!

There is another nation illustrious by its valour and its victories. It has a multitude of nobility distinguished by their bravery; its dominions which are of vast extent, might render it respectable throughout all Europe, and in a short time it might be in a most flourishing situation. But its constitution opposes this, and the attachment of the nobles to that constitution, is such, that there is no room to expect a proper remedy will ever be applied. In vain might a magnanimous king, raised by his virtues above the pursuits of ambition and injustice, form the most salutary designs for promoting the happiness of his people; in vain might he cause them to be approved by the most sensible, and even the greatest part of the nation: a single deputy, obstinate or corrupted by a foreign power, might put a stop to all, and break the wisest and most necessary measures. From an excessive jealousy of its liberty, the nation has taken such precautions as must necessarily place it out of the power of the king to make any attempts on the liberties of the public. But do not we see that these measures exceed the end; that they would tie the hands of the most just and wise prince, and deprive him of the means of securing the public freedom from the enterprizes of foreign powers, and of rendering the nation rich and happy? Do we not see that the nation itself is placed out of the power of acting, and that its councils are committed to the caprice or treachery of a single minister?

We shall therefore conclude this chapter, with observing, that a nation ought to know itself. Without this knowledge it cannot make any successful endeavours after its own perfection. It ought to have a just idea of its state, to enable it to take the most proper measures; to know the progress already made, and those that are still to be put in execution; what is good, and what is

§ 25.
A nation
ought to
know itself.

defective in the constitution, in order to preserve the one, and correct the other. Without this knowledge a nation will act at random; and often take the falsest measures. It will think it acts with great wisdom in imitating the conduct of a people reputed wise, and not perceive that such regulations, and such proceedings as are salutary to one state are often pernicious to another. Every thing ought to be conducted according to its nature. Nations cannot be well governed without such regulations as are suitable to their respective characters, and in order to this they ought to be known.

C H A P. III.

Of the Constitution of a State, and the Duties and Laws of the Nation in this Respect.

WE were unable to avoid in the first chapter, anticipating something of this.

§ 26.
Of public
authority.

We have seen already that every political society must necessarily establish public authority, to regulate common affairs, to prescribe to each individual the conduct he ought to observe with a view to the public welfare, and the means of procuring obedience. This authority essentially belongs to the body of the society; but it may be executed by very different methods, and every society has a right to choose that most agreeable to it.

§ 27.
What is the
constitution
of a state.

The fundamental regulation that determines the manner in which the public authority is to be executed, is what forms the *constitution of the state*. In this is seen the form by which the nation acts in quality of a body-politic: how and by whom the people ought to be governed; and what are the laws and duties of the governors. This constitution is in fact nothing more, than the establishment of the order in which a nation proposes to labour in common for obtaining those advantages with a view to which the political society was established.

§ 28.
The nation
ought to
choose the
best.

The perfection of a state, and its aptitude to fulfil the ends proposed by the society, must then depend on the constitution; consequently it is of the greatest moment to a nation that forms a political society; and its first and most important duty towards itself, is to choose the best constitution possible, and that most suitable to its circumstances. When it makes this choice, it lays the foundation of its preservation, safety, perfection, and happiness: it cannot take too much care in placing these on a solid basis.

§ 29.
Of the po-
litical,
funda-
mental, and
civil laws.

The laws are regulations established by public authority to be observed in society. All these ought to relate to the welfare of the state and of the citizens. The laws made directly with a view to the public welfare, are the *Political Laws*; and in this class, those that concern the body itself, and the being of the society, the form of government, the manner in which the public autho-

city

city is to be exerted ; and those, in a word, which together form the constitution of the state, are the *Fundamental Laws*.

The *Civil Laws* are those that regulate the conduct and behaviour of the citizens among themselves.

Every nation that would not be wanting to itself, ought to apply its utmost care in establishing these, and principally in its fundamental laws ; to establish them, I say, with wisdom, in a manner suitable to the genius of the people and to all the circumstances in which they may be placed, they ought to determine them, and make them known with plainness and precision, to the end, that they may remain stable, that their punishments may not be eluded, and, that they may create, if possible, no *dissention* ; that on the one hand, he or they to whom the exercise of the sovereign power is committed, may obtain confidence and respect ; and the citizens, on the other, know equally their duty, and their privileges. It is not our business particularly to consider, what ought to be this constitution, and these laws ; this discussion belongs to public laws and politics. Besides, the laws and constitutions of different states must necessarily vary according to the disposition of the people, and other circumstances. In the Law of Nations we must adhere to generals. We here consider the duty of nations towards themselves, principally to determine the conduct that ought to be observed in that great society which nature has established among all people. These duties give them rights, that serve as a rule to establish what may be required from other nations, and reciprocally what others may require from them.

The constitution and its laws are the basis of the public tranquillity, the firmest support of the public authority, and pledge of the liberty of the citizens. But this constitution is a vain phantom, and the best laws are useless if they are not religiously observed : the nation ought then to watch very attentively, in order to render them equally respected by those who govern, and by the people destined to obey. To attack the constitution of the state, and to violate its laws, is a capital crime against society, and if those guilty of it are invested with authority, they add to this crime a perfidious abuse of the power with which they are intrusted. The nation ought constantly to suppress these abuses with its utmost vigour and vigilance, as the importance of the case requires. It is very uncommon to see the Laws and Constitution of a state openly and boldly opposed : it is against silent and slow attacks that a nation ought to be particularly on its guard. Sudden revolutions strike the imaginations of men : we write histories of them ; and unfold their cases : but we neglect the changes that insensibly happen, by a long train of steps that are but little observed. It would be doing an important service to nations to shew from history, how states have entirely changed their nature, and lost their original constitution. This would awaken the attention of the people, and from thence forward, filled with this excellent maxim, no less essential in politics than in morals, *Principiis obsta*, they would no longer shut their eyes

§ 30.
Of the support of the constitution and obedience to the laws.

against

against innovations, which though inconsiderable in themselves, may serve as steps to mount to higher and more pernicious enterprises.

§ 31.
The rights
of a nation
with re-
spect to its
constitution
and go-
vernment.

The consequences of a good or bad constitution being of such importance, and the nation finding itself so strictly obliged to procure, as well as it is able, the best and most convenient, it has a right to every thing, without which it could not fulfil this obligation (§ 18.) It is then manifest that a nation has a right to form, maintain, and perfect its constitution, and to regulate at pleasure every thing relating to the government, while no person can have a just right to hinder it. Government is established only for the sake of the nation, with a view to its safety and happiness.

§ 32.
It may re-
form the
govern-
ment.

If any nation is dissatisfied with the public administration, it may reduce it to order, and reform the government. But observe, that I here say the nation; for I am very far from intending to authorise any malecontents or busy persons to give disturbance to their governors, by exciting murmurs and seditions. None but the body of a nation have a right to call to account those at the helm who abuse their power. When the nation is silent and obeys, the people are considered as approving the conduct of their superiors, or at least of finding it supportable, and it is not the business of a small number of citizens to put the state in danger, under the pretence of reforming it.

§ 33.
And
change the
constitu-
tion.

In virtue of the same principles, it is certain that if the nation is uneasy under its constitution, it has a right to change it.

There can be no difficulty in this, in case the whole nation be unanimously inclined to make this change: It is asked, what ought to be done if the people are divided? According to the common method of states, the opinion of the majority must pass without dispute for that of the whole nation; otherwise it would be impossible for the society ever to take any resolution. It appears then from the same reason, that a nation may change the constitution of the state, by a majority of votes, and whenever there is nothing in this change that can be considered as contrary to the act of the civil association, or to the intention of those united under it, all are bound to conform to the resolution of the majority. But if the question be, to quit a form of government, to which alone it appeared that the people were willing to submit, on their entering into the bonds of society; if the greatest part of a free people, after the example of the Jews, in the time of Samuel, are weary of liberty, and resolved to submit to the authority of an absolute prince, the citizens more jealous of that privilege, so invaluable to those who have tasted it, though obliged to suffer the majority to do as they please, are under no obligation at all to submit to the new government: they may leave a society that seems to have dissolved itself, in order to be united under another form; and have a right to retire elsewhere, to sell their lands, and take with them all their effects.

A very

A very important question here presents itself. It essentially belongs to the society to make laws both in relation to the manner in which it desires to be governed, and to the conduct of the citizens: this is called the *legislative power*. The nation may entrust the exercise of it to the prince, or to an assembly; or to that assembly and the prince jointly; who have then a right of making new, and abrogating old laws. It is here demanded whether, if their power extends so far as to the fundamental laws, they may change the constitution of the state? The principles we have laid down lead us to decide this point with certainty, that the authority of these legislators does not extend so far, and that they ought to consider the fundamental laws as sacred, if the nation has not, in very express terms, given them the power to change them. For the constitution of the state ought to be fixed: and since that was first established by the nation, which afterwards trusted certain persons with the legislative power, the fundamental laws are excepted from their commission. It appears that the society had only resolved to make provision for the state's being always furnished with laws suited to particular conjunctures, and gave the legislature, for that purpose, the power of abrogating the ancient, civil, and political laws, that were not fundamental, and of making new ones: but nothing leads us to think that it was willing to submit the constitution itself to their pleasure. In short, these legislators derive their power from the constitution, how then can they change it, without destroying the foundation of their authority? By the fundamental laws of England the two houses of parliament in concert with the king, exercise the legislative power: but if the two houses should resolve to suppress themselves, and to invest the king with the full and absolute government, certainly the nation would not suffer it. And who can presume to say, that they would not have a right to oppose it? But if the parliament entered into a debate on making so considerable a change, and the whole nation was voluntarily silent upon it, this would be considered as an approbation of the act of its representatives.

But in treating here of the change of the constitution, we treat only of a right, what is expedient belongs to politics. We shall therefore only observe in general, that great changes in a state being delicate and very dangerous affairs, and that frequent changes being in their own nature prejudicial, a people ought to be very circumspect in doing it, and never be inclined to make innovations without the most pressing reasons, or an absolute necessity. The spirit of inconstancy which prevailed among the Athenians, was always contrary to the happiness of that republic, and was at length fatal to that liberty of which they were so jealous without knowing how to enjoy it.

We may conclude from what has been said (§ 31.), that if there arises any disputes in a state on the fundamental laws, on the public administration, or on the prerogatives of the different powers of which it is composed, it is the business of the nation alone, to judge of all disputes relating to the government.

§ 34.
Of the legislative power, and whether it can change the constitution.

§ 35.
The nation ought not to do it without great precaution.

§ 36.
It is to judge of all disputes relating to the government.

alone, to judge and determine them, in conformity to its political constitution.

§ 37.
No foreign
power has a
right to
interfere.

In short, all these affairs being solely a national concern, no foreign power has a right to interfere in them; nor ought to do it otherwise than by its good offices, unless that state be desired, or called by particular reasons. If any intrude into the domestic affairs of another nation, and attempt to influence its deliberations, they do it an injury.

C H A P. IV.

Of the Sovereign, his Obligations and Prerogatives.

§ 38.
Of the so-
vereign.

THE reader cannot expect to find here a long deduction of the prerogatives of sovereignty, and the duties of a prince. These are to be found in treatises on the public law. We only propose in this chapter to shew, in consequence of the grand principles of the law of nations, what a sovereign is, and to give a general idea of his obligations and prerogatives.

We have said that the *sovereignty* is that public authority, which commands in civil society, and orders and directs what each is to perform, to obtain the end of its institution. This authority belonged originally and essentially to the body of the society, to which each member submitted, and ceded the rights he received from nature, to conduct himself in every thing as he pleased, according to the dictates of his own understanding, and to do himself justice. But the body of the society does not always retain this sovereign authority: it frequently trusts it to a senate, or to a single person. The senate, or this person is then the sovereign.

§ 39.
It is solely
established
for the safe-
ty and ad-
vantage of
society.

It is evident that men form a political society, and submit to laws, solely for their own advantage and safety. The sovereign authority is then established, only for the common good of all the citizens, and it would be absurd to think that it could change its nature on its passing into the hands of a senate, or a monarch. Flattery therefore cannot disown, without rendering itself equally ridiculous and odious, that the sovereign is only established for the safety of the state, and the advantage of society.

A good prince, a wise conductor of society, ought to have his mind impressed with this great truth, that the sovereign power is solely intrusted with him for the safety of the state, and the happiness of all his people; that he is not permitted to seek himself in the administration of affairs, to propose his own satisfaction, or his private advantage; but that he ought to direct all his views, all his steps to the great advantage of the state and people who have submitted to him. How noble a sight is it, to see a king of England, acquaint his parliament with his principal operations; assure that body, the representations of the nation, that he proposes no other end but the glory of the state, and the happiness of
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his people, and affectionately thank all who concur with him in such salutary views! Certainly a monarch who makes use of this language, and proves his sincerity by his conduct, is, in the opinion of the wise, the only great man. But for a long time a base flattery has, in most kingdoms, caused these maxims to be forgotten. A crowd of servile courtiers, without difficulty, persuade a proud monarch that the nation was made for him, and not he for the nation. He soon considers the kingdom as his patrimony, and his people as a herd of cattle, from which he may obtain riches, and dispose of them so as best to answer his views, and gratify his passions. From thence arise those fatal wars undertaken by ambition, restlessness, hatred and pride. From thence those oppressive taxes, dissipated by luxury, or squandered upon mistresses and favourites: from thence, in fine, are important posts given by favour, while public merit is neglected, and every thing does not immediately interest the prince, abandoned to ministers and subalterns. Who can observe in this unhappy government, authority established for the public welfare? a great prince will be on his guard, even against his virtues. Let us not say, with some writers, that private virtues are not the virtues of kings: the maxim of superficial politicians, or of those who are very inaccurate in their expressions. Goodness, friendship, gratitude, are still virtues of the throne; and would to God they were to be always so! but a wise king does not, without discernment, give himself up to their impressions. He cherishes them, he cultivates them in his private life: but in state-affairs he listens only to justice and sound politics. And why? because he knows that the government was trusted to him only for the happiness of society, and that therefore he ought not to consult his own pleasure in the use he makes of his power. He tempers his goodness with wisdom. He gives to friendship his domestic and private favours; he distributes posts and employments according to merit; public rewards to services done to the state. In a word, he uses the public power only with a view to the public welfare. All this is comprehended in the fine saying of Lewis XII. "A king of France does not revenge the injuries of a duke of Orleans."

A political society is a moral person (prelim. § 2.) as it has an understanding and a will, of which it makes use for the conduct of his affairs, and is capable of obligations and laws. When therefore a people confer the sovereignty on any one person, they invest him with their understanding and will; and make over to him their obligations and rights, so far as relates to the administration of the affairs of state, and the exercise of the public authority; thus the sovereign, or conductor of the state, becoming the subject, in which reside the obligations and rights relative to government, in him is found the moral person, who, without absolutely ceasing to exist in the nation, acts from thence forwards only in and by him. Such is the origin of the representative character attributed to the sovereign. He represents the nation

in

§ 40.
Of his representative character.

in all the affairs it was capable of managing as sovereign. It does not debase the dignity of the greatest monarch to attribute to him this representative character; on the contrary, nothing can make him shine with greater lustre: for, by this means the monarch unites, in his own person, all the majesty that belongs to the entire body of the nation.

§ 41.
He is intrusted with the obligations of the nation, and invested with its rights.

§ 42.
His duty with respect to the preservation and perfection of the nation.

§ 43.
His rights in this respect.

§ 44.
He ought to know the nation.

§ 45.
The extent of his power, and sovereign authority.

§ 46.
The prince ought to respect, and maintain the fundamental laws.

The sovereign thus clothed with the public authority, with every thing that constitutes the moral personality of the nation, is under the obligations of that nation, and invested with its rights.

All that has been said in chap. II. of the general duties of a nation towards itself, particularly regards the sovereign. He is the depositary of the empire, and of the power of commanding whatever relates to the public welfare; he ought, therefore, as a tender and wise father, and as a faithful administrator, to watch for the nation, to take care of preserving it, to render it more perfect, to better its state, and to secure it, as much as he is able, from every thing that threatens its safety, or its happiness.

From thence he receives all the rights of a nation, to preserve and improve itself (See §§ 18, 20, and 23, of this book) all these rights, I say, reside in the sovereign, who is therefore indifferently called the conductor of the society, superior, prince, &c.

We have observed above, that every nation ought to know itself. This obligation is devolved on the sovereign, since he is to watch over the preservation and perfection of the nation. The duty which the law of nature here imposes on the conductors of nations is of extreme importance, and of very great extent. They ought to know exactly all the countries subject to their authority, their qualities, defects, advantages, and situation with regard to the neighbouring states; and they ought to obtain a perfect knowledge of the manners and general inclinations of their people, their virtues, vices, talents, &c. All these branches of knowledge are necessary to enable them to govern properly.

The prince derives his authority from the nation; and it is exactly equal to what they have entrusted him with. If the nation has simply and strictly invested him with the sovereignty without limitation, or division, he is supposed to be invested with all the prerogatives, without which the sovereign command, or authority, could not be exerted in the manner most conducive to the public welfare. These are called *regal prerogatives*, or *the prerogatives of majesty*.

But the sovereign power is limited and regulated by the fundamental laws of the state; those laws shew the prince the extent and bounds of his power, and the manner in which it ought to be exerted. The prince is therefore strictly obliged not only to respect, but also to support them. The constitution and the fundamental laws are the plan on which the nation has resolved to endeavour the obtaining happiness: the execution is intrusted to the prince. If he religiously follows this plan; if he regards the

the fundamental laws as inviolable and sacred rules, and knows that the moment he deviates from them, his commands become unjust, and are no less than a criminal abuse of the power with which he is entrusted. He is, in virtue of this power, the guardian and defender of the laws; and being obliged to punish whoever shall presume to violate them, he himself ought not to trample them under his feet.

If the prince be invested with the legislative power, he may, according to his wisdom, and when it is necessary for the advantage of the state, abolish those laws that are not fundamental, and make new ones. See what we have said on this subject in the preceding chapter, § 34.

§ 47.
He may change the laws not fundamental.

But while these laws subsist, the sovereign ought religiously to maintain and observe them. They are the foundation of the public tranquillity, and the firmest support of the sovereign authority. Every thing is uncertain, oppressive, and subject to revolutions, in those unhappy kingdoms where arbitrary power has placed her throne. It is therefore the true interest of the prince, as well as his duty, to maintain and respect the laws. He ought to submit to them himself. We find this truth established in a piece published by order of Lewis XIV. the most absolute prince that ever reigned in Europe. "Let it not be said that the sovereign is not subject to the laws of his state, since the contrary proposition is one of the truths of the law of nations, which flattery has sometimes attacked, and which good princes have always defended, as a tutelar divinity of their states *."

§ 48.
He ought to maintain and observe those that subsist.

But it is necessary to explain this submission of the prince to the laws. First he ought, as we have just seen, to follow their regulations in all the acts of his administration. In the second place, he is himself subject, in his private affairs, to all the laws that relate to property. I say in his private affairs; for when he acts as a sovereign prince, and in the name of the state, he is subject to none but to the fundamental laws, and the law of nations. In the third place the prince is subject to certain regulations of the general polity, considered by the state as inviolable, at least if he be not excepted by the law in express terms, or tacitly by a necessary consequence of his dignity. I would speak here of the laws that relate to the situation of the people in life, and particularly to the validity of marriages. These laws are established to ascertain the state of families: now the royal family is that of all others the most important to be certainly known. But fourthly, we shall observe in general, with respect to this question, that if the prince is invested with a full, absolute, and unlimited sovereignty, he is above the laws, which receive from him all their force, and he may dispense with his own observance of them, whenever natural justice and equity will permit him. Fifthly, as to the laws relative to manners and good order, the

§ 49.
In what sense he is subject to the laws.

* A treatise on the right of the queen to several estates in Spain, 1667, in 1720, part II. p. 191.

prince ought doubtless to respect them, and to support them by his example. But sixthly, he is certainly above all civil penal laws. The majesty of a sovereign will not suffer his being punished like a private person; and his employments are too sublime to admit of his being troubled under the pretence of a fault that does not directly concern the government of the state.

§ 50.
His person
is sacred
and invio-
lable.

It is not enough that the prince be above the penal laws: even the interest of nations requires that we should go something farther. The sovereign is the soul of the society; if he be not held in veneration by the people, and in perfect security, the public peace, and the happiness and safety of the state are in continual danger. The safety of the nation then necessarily requires, that the person of the prince ought to be sacred and inviolable. The people of Rome bestowed this privilege on their tribunes, in order that they might meet with no obstruction in defending them, and that the discharge of their office might not be attended with fear. The cares, the employments of a sovereign are of much greater importance, than those of the tribunes were, and not less dangerous, if they are unprovided with a powerful defence. It is impossible even for the most just and wise monarch, not to make malecontents; and ought the state to continue exposed to the danger of losing this prince by the hand of an assassin? The monstrous and foolish doctrine, that a private person is permitted to kill a bad prince, deprived the French, in the beginning of the last century, of an hero who was truly the father of his country. Whatever a prince may be, it is an enormous crime against a nation to deprive the people of a sovereign, whom they think proper to obey.

§ 51.
How a na-
tion may
curb a ty-
rant, and
withdraw
itself from
his obe-
dience.

But this high attribute of sovereignty is no reason why a nation should not curb an insupportable tyrant, call him even to an account, respecting in his person the majesty of his rank, and withdraw itself from his obedience. To this indisputable right a powerful republic owes its birth. The tyranny exercised by Philip II. in the Netherlands, excited those provinces to rise: seven of them, closely confederated, bravely maintained their liberties, under the conduct of a hero of the house of Orange, and Spain, after several vain and destructive efforts, acknowledged them sovereign and independent states. If the authority of the prince is limited and regulated by the fundamental laws, the prince on leaving the bounds prescribed him, commands without any right, and even without a just title; the nation, then, is not obliged to obey him; but may resist his unjust enterprises. As soon as he attacks the constitution of the state, the prince breaks the contract which bound the people to him; the people become free by the act of the sovereign, and see nothing in him but an usurper who would load them with oppression. This truth is acknowledged by every sensible writer, whose pen is not enslaved by fear, or rendered venial by interest. But some celebrated authors maintain, that if the prince is invested with the supreme command in a full and absolute manner, nobody has a right to resist

resist him, much less to curb him, and that the nation has no resource left but to suffer and obey with patience. This is founded upon the supposition that such a sovereign need not give an account to any person of the manner in which he governs, and that if the nation might controul his actions and resist him, where they were found to be unjust, his authority would no longer be absolute; which would be contrary to this hypothesis. They say that an absolute sovereign possesses completely all the political authority of the society, in which nobody can oppose him: if he abuses it, he does ill, indeed, and wounds his conscience, but that his commands are not the less obligatory, as being founded on a lawful right to command: that the nation by giving him absolute authority, had reserved nothing to itself, and had submitted to his discretion, &c. We might satisfy ourselves with answering, that in this light there is not any sovereign who is completely and fully absolute. But in order to remove all these vain subtilties, let us remember the essential end of civil society: Is it not to labour in concert for the common happiness of all? Is it not with this view that every citizen strips himself of his rights, and resigns his liberty? Was it in the power of the society to make such use of its authority as to deliver up itself, and all its members, without relief, to the discretion of a cruel tyrant? No, certainly, since it had no right itself, if it was disposed to it, to oppress a part of the citizens. When it therefore conferred the supreme and absolute government, without an express reserve, it was necessarily with the tacit reserve, that the sovereign should use it for the safety of the people, and not for their ruin. If he becomes the scourge of the state, he degrades himself; he is no more than a public enemy, against whom the nation may and ought to defend itself; and if he has carried his tyranny to the utmost height, why should even the life of so cruel and perfidious an enemy be spared? Who presumes to blame the Roman senate, that declared Nero an enemy to his country?

But it is of the utmost importance to observe, that this judgment can only be passed by the nation, or by the body by which it is represented; and that the nation itself cannot make any attempt on the person of the sovereign, but in cases of extreme necessity, and when the prince, by violating the laws, and threatening the safety of his people, puts them in a state of war against him. The person of the sovereign, the very interest of the nation declares sacred and inviolable; but not that of an unnatural tyrant, and an enemy of the public. We seldom see such monsters as Nero. In the most common cases, when a prince violates the fundamental laws; when he attacks the liberties and privileges of his subjects; when he is absolute; when his government, without being carried to the utmost length of tyranny, manifestly tends to the ruin of the nation; it may resist him, try him, and withdraw from his obedience: but though this may be done, his person should be spared, and that for the welfare of the state. It is more than one age since the English took up
C arms

arms against their king, and obliged him to descend from the throne. The bold and ambitious took advantage of the terrible ferment, caused by fanaticism and a party spirit, and Great Britain suffered her sovereign to die unworthily on a scaffold. The nation coming to itself, acknowledged its blindness: but if it some years after made a solemn reparation, it was not only from the opinion that the unfortunate Charles I. did not deserve so cruel a fate; but doubtless from a conviction, that for the safety even of the state, the person of the sovereign ought to be sacred and inviolable, and that the whole nation ought to render this maxim venerable, in paying a respect to it, when the care of its own preservation would permit.

One word more on the distinction that is endeavoured to be made here in favour of an absolute sovereign. Whoever has well weighed the strength of the indisputable principles we have established, will be convinced, that when it is necessary to resist a prince become a tyrant, the *right* of the people is the same, whether that prince was made absolute by the laws, or was not; because this *right* flows from the end of political society, the safety of the nation, which is the supreme law. But if the distinction, of which we are treating, is of no moment with respect to that right, it can be none in practice, with respect to what is suitable. As it is very difficult to oppose an absolute prince, and it cannot be done without raising great disturbances in the state, and the most violent and dangerous commotions; it ought to be attempted only in cases of extremity, when the public misery is raised to such a height, that the people may say with Tacitus, *miseram pacem, vel bello bene mutari*; that it is better to expose themselves to a civil war, than to endure them. But if the prince's authority be limited, if it, in some respects depends on a senate or on a parliament that represents the nation, there are means of resistance, and of curbing him, without exposing the state to such violent shocks. There can be no reason to expect that the evil will be extreme, when such mild and innocent remedies can be applied to it.

§ 52.
Arbitration
between
the king
and his
subjects.

But however limited the prince's authority may be, he is commonly very jealous of it; it seldom happens that he suffers resistance with patience, and submits peaceably to the judgment of his people. Can he want supports, while he is the distributor of favours? We see too many base and ambitious minds to whom the state of a rich slave has more charms, than that of a modest and virtuous citizen. It is therefore always difficult for a nation to resist a prince and pronounce a judgment on his conduct, without exposing the state to dangerous troubles, and to shocks capable of overturning it. This has sometimes occasioned a compromise between the prince and the subjects to submit to the decision of a friendly power, all the disputes that may arise between them. Thus the kings of Denmark have formerly condescended, by solemn treaties, to refer to those of Sweden, the differences that might arise between them and their senate: this
the

the kings of Sweden have also done with regard to those of Denmark. The princes and states of West Friesland, and the burghesses of Embden, have in the same manner constituted the republic of the United Provinces the judge of their differences. The princes of Neuschâtel established, in 1456, the canton of Bern, the judge and perpetual arbitrator of their disputes. Thus also, according to the spirit of the Helvetic confederacy, the entire body takes cognizance of the troubles that arise in any of the confederated states, though each of them is truly sovereign and independent.

As soon as a nation acknowledges a prince for its lawful sovereign, all the citizens owe him a faithful obedience. He can neither govern the state, nor perform what the nation expects from him, if he is not punctually obeyed. Subjects then have no right, in doubtful cases, to question the wisdom or justice of their sovereign's commands; this examination belongs to the prince: his subjects ought to suppose, if there be a possibility of doing it, that all his orders are just and salutary: he alone is accountable for the evil that may result from them.

§ 53.
The obedience which subjects owe to a sovereign.

In the mean time, this ought not to be entirely a blind obedience. No engagement can oblige, or even authorise, a man to violate the laws of nature. All authors who have any regard to conscience, or modesty, agree, that a person ought not to obey such commands as are evidently contrary to the laws of God. Those governors of places who bravely refused to execute the barbarous orders of Charles IX. to the famous St. Bartholomew, have been universally praised; and the court did not dare to punish them, at least openly. "Sire, said the brave Orte, governor of Bayonne, in his letter, I have communicated your majesty's command to your faithful inhabitants and warriors in the garri-son: and I have found there only good citizens and brave soldiers; not one hangman: therefore both they and I most humbly entreat your majesty, to be pleased to employ your arms and lives in things that are possible, however hazardous they may be, and we will exert ourselves to the last drop of our blood*." The count de Tende, Charney, and others, replied to those who brought them the orders of the court, that they had too great a respect for the king, to believe that such barbarous orders came from him.

§ 54.
In what cases the subject may resist him.

It is more difficult to determine in what cases a subject may not only refuse to obey, but even resist a sovereign, and by force repel force. When a sovereign does injury to any one, he acts without any real authority; but we ought not from thence to conclude hastily, that the subject may resist him. The nature of sovereignty, and the welfare of the state, will not permit citizens to oppose a prince whenever his commands appear to them unjust or prejudicial. This would be to fall again into the state of nature, and to render government impossible. A subject ought

* Mezeray's Hist. of France, vol. II. p. 1107.

to suffer with patience, from the prince, acts of injustice that are doubtful and supportable. First, because whoever has submitted to the decision of a judge, is no longer capable of deciding his own pretensions: those instances of injustice that are supportable, ought to be passed over, from a regard to the peace and safety of the state, and on account of the great advantages obtained by living in society. It is presumed that every citizen has tacitly engaged to observe this moderation, because, without it society could not subsist. But when the injuries are manifest and atrocious; when a prince, without any apparent reason, is resolved to deprive us of life, or of those things, the loss of which would render life bitter, who can dispute our right to resist him? Self-preservation is not only a law of nature, but an obligation imposed by nature, and no man can entirely and absolutely give it up to another. And though he might give it up, can he be considered as having done it by his political engagements, when he entered into society only to establish his own safety upon a more solid basis? The welfare of society does not require such a sacrifice; and, as Barbeyrac well observes in his notes on Grotius, "If the public interest requires, that those who obey, should particularly suffer something; it is not less for the public interest that those who command, should be afraid of carrying their patience to the utmost extremity*." The prince who violates all laws, who observes no measures, and who would in his transports of fury take away the life of an innocent person, strips himself of his royalty, and is no more than an unjust and outrageous mortal, against whom his people are allowed to defend themselves. But he, who, after having lost all the sentiments of a sovereign, divests himself even of the appearances and exterior conduct of a monarch, degrades himself; he no longer retains the sacred person of a sovereign, and cannot retain the prerogative attached to his sublime character. However, if this prince is not a monster; if he is furious only from a just passion, and is supportable to the rest of the nation; the respect we ought to pay to the tranquillity of the state is such, and the respect of sovereign majesty so powerful, that we are strictly obliged to seek every other means of preservation, rather than to put his person in danger. Every one knows the example set by David: he fled; he kept himself concealed, to secure himself from Saul's fury; and more than once saved the life of his persecutor. When the reason of Charles VI. of France was suddenly disordered by a fatal accident, he in his fury killed several of those who surrounded him: none of them thought of securing his own life at the expence of that of the king; they only endeavoured to disarm him, and to make him master of himself: they did their duty like brave men and faithful subjects, in exposing their lives, to save that of this unfortunate monarch. We owe this sacrifice to the state and to sovereign majesty: furious, from the disorder of his organs,

* *De Jure Belli & Pacis*, Lib. I. cap. iv. § ii. not. I.

Charles was not guilty; he might recover his health, and again become a good king.

What has been said is sufficient for the intention of this work: § 55.
the reader may see these questions treated more at large in many Of minist-
books that are well known. We shall finish this subject with an ters.
important observation. A sovereign is undoubtedly allowed to take ministers, to ease him in the painful office of government; but he ought never to abandon his authority to them. When a nation chuses a conductor, it is not for him to deliver up his charge into other hands. Ministers ought to be only instruments in the hands of the prince; he ought constantly to direct them, and continually endeavour to know whether they follow his instructions. If the imbecility of age, or some infirmity render him incapable of government, a regent ought to be nominated, according to the laws of the state: but when the sovereign can hold the reins, let him make use of them, and not put them into other hands. The last kings of France of the first race delivered the government and authority to the mayors of the palace: thus they became mere phantoms, and justly lost the title and honour of a dignity, the functions of which they had abandoned. The nation is a gainer by crowning an all-powerful minister; for he will improve, as his inheritance, the funds he plundered while he had only a precarious use of them.

C H A P. V.

Of States Elective, Successive or Hereditary, and of those called Patrimonial.

WE have seen in the preceding chapter, that it originally be- § 56.
longed to a nation to confer the supreme authority, and to Of elective
chuse that by which it was to be governed. If it confers the sta. ca.
sovereignty on the person only, reserving the right of chusing a suc-
cessor after the sovereign's death, the state is *elective*. As soon
as the prince is elected according to law, he enters into the pos-
session of all the prerogatives which those very laws annex to his
dignity.

It has been debated, whether elective kings and princes are § 57.
real sovereigns. But he who lays any stress on this circumstance If elective
must have only a very confused idea of sovereignty. The man- kings are
ner in which a prince obtains a dignity, has nothing to do with real sove-
determining its nature. We must consider, first, whether reigns.
the nation itself forms an independent society (see chap. I.) and se-
condly, what is the extent of the power it has entrusted to the
prince. Whenever the chief of an independent state really re-
presents a nation, he ought to be considered as a true sovereign,
(§ 40.) though even his authority should be limited in several
respects.

§ 58.
Of states
successive
and heredi-
tary.
The origin
of the right
of succeffion.

When a nation would avoid the troubles with which the election of a sovereign seldom fails of being accompanied, it makes its choice for a long succession of years, by establishing the *right of succession*, or in rendering the crown hereditary in a family, according to the order and rules that appear most agreeable to that nation. The name of an *Hereditary State* or *Kingdom* is given to that where the successor is appointed by the same law that regulates the successions of the individuals. The *Successive Kingdom* is that where a person succeeds according to a particular fundamental law of the state. Thus the lineal succession of the males alone, is established in France.

§ 59.
Other origins of this right.

The right of succession is not always the primitive establishment of a nation; it may have been introduced by the succession of another sovereign; and even by usurpation itself. But when it is supported by a long possession, the people are considered as having consented to it; and this tacit consent renders it lawful, though the source be vicious. It rests then on the foundation we have already pointed out; a foundation that alone is lawful and incapable of being shaken, and to which it must constantly return.

§ 60.
Other sources which still return to the same.

This right, according to most authors, and particularly Grotius, may be derived from other sources, as conquest, or the right of a proprietor, who, on his becoming master of a country, invites inhabitants to settle there, and gives them lands, on condition of their acknowledging him and his heirs for their sovereigns. But as it is absurd to suppose that a society of men can submit otherwise than with a view to their own safety and welfare, and still more that they can bind their posterity on any other footing, every thing must at last return to the same source, and it must still be said, that the succession is established by the express will, or the tacit consent of the nation, for the welfare and safety of the state.

§ 61.
A nation may change the order of the succession.

It thus remains a constant truth, that in all cases the succession is only established and received with a view to the public welfare and the common advantage. If it happens then that the order established in this respect becomes destructive to the state, the nation has certainly the right of changing it by a new law. *Salus populi suprema lex*, the safety of the people is the supreme law; and this law is agreeable to the strictest justice, the people being united in society only with a view to their safety and greater advantage.

This pretended proprietary right attributed to princes, is a chimera produced by an abuse of the pretended laws of inheritance with respect to private persons. The state neither is, nor can be a patrimony, since the patrimony is only made for the welfare of the master, while the prince is established only for the welfare of the state. The consequence is evident: if the nation plainly perceives the heir would be a pernicious sovereign, it has a right to exclude him.

The authors whom we oppose, grant this right to a despotic prince, while they refuse it to nations. This is because they consider such a prince as a real proprietor of the empire, and

will not acknowledge that the care of their own safety, and the rights of government, essentially belong to the society, when they have entrusted them without express reserve to a monarch and his heirs. In their opinion, the kingdom is the inheritance of the prince, in the same manner as his field and his flocks. A maxim injurious to human nature, and which they would not have produced in an enlightened age, if they had not supposed that are too often stronger than reason and justice.

A nation may, for the same reason, oblige one branch who removes to another country, to renounce all claim to the crown, as a daughter who marries a foreign prince. These renunciations, required or approved by the state, are extremely valid, since they are equivalent to a law that such persons and their posterity should be excluded from the throne. Thus the laws of England have for ever rejected every Roman Catholic. "Thus a law of Russia, made at the beginning of the reign of Elizabeth, most wisely excluded from the possession of the crown, every heir who possessed another monarchy; and thus the law of Portugal disqualifies every stranger who lays claim to the crown by "right of blood *."

Celebrated authors, in other respects very learned and judicious, have then wanted true principles in treating of renunciations. They have expatiated greatly on the rights of infants born or to be born, of the transmission of these rights, &c. but they ought to have considered the succession, as less a property of the reigning family, than as a law of the state. From this clear and incontestible principle easily flows the whole doctrine of renunciations. Those required or approved by the state are valid and sacred; and these are the fundamental laws: those not authorised by the state can be only obligatory to the prince who made them. They cannot injure his posterity, and he himself may return, in case the state requires and calls him: for this he owes to a people who had committed their safety to his care. By the same reason, the prince cannot lawfully resign at an improper juncture, to the damage of the state, and abandon in imminent danger a nation that had put itself under his care.

In ordinary cases, when the state may follow the established rule, without being exposed to very great and manifest danger, it is certain, that every descendant ought to succeed, when the order of the succession calls him to the throne, with whatever incapacity of reigning by himself he may be accused. This is a consequence of the spirit of the law that established the succession: for the people had recourse to it, to prevent the troubles which would otherwise have been almost inevitable at every change. Now little advances must have been made towards obtaining this end, if at the death of a prince, the people were allowed to examine the capacity of his heir, before they acknowledged him for their sovereign. "What a door would this

* *Spirit of Laws*, Book XXVI. chap. XXIII. where may be seen very good political reasons for these regulations.

"open for usurpers or malecontents!—It was to avoid these inconveniencies that the order of succession was established; and nothing more wise could have been done; since by this means no more is required than his being the king's son, and his having life, which can admit of no dispute; but on the other hand there is no rule fixed to judge of the capacity or incapacity of reigning*." Though the succession was not established for the particular advantage of the sovereign and his family, but for that of the state; the successor appointed has nevertheless a right, to which justice requires that regard should be paid. His right is subordinate to that of the nation, or to the safety of the state; but it ought to take place when the public welfare does not oppose it.

§ 64.
Of regents.

These reasons have the greater weight, where the law, or the state, may remedy the incapacity of the prince by nominating a regent, in the same manner as is practised in case of his minority. This regent is invested, during the whole time of his administration, with the royal authority; but he executes it in the king's name.

§ 65.
The indivisibility of sovereignties.

The principles we have just established on the successive or hereditary right, manifestly shew, that a prince has no right to divide his state among his children. Every sovereignty, properly so called, is in its own nature one, and indivisible; and those who have united in society cannot be separated in spite of themselves. These partitions, so contrary to the nature of sovereignty and the preservation of states, have been much in use: but an end has been put to them, wherever the people, and even the princes themselves, have had a full view of their greatest interest, and the foundation of their safety.

But when a prince has united several different nations under his authority, his empire is then properly an assemblage of several societies subject to the same head; and nothing can naturally hinder his being able to divide them between his children: he may distribute them, if there be no law, nor any conventions to the contrary, and if each of his states consents to receive the sovereign he appoints for it. For this reason France was divided under the two first races†. But being entirely incorporated under the third, it became indivisible, and a fundamental law has declared it so. That law, wisely providing for the preservation and splendour of the kingdom, unites irrevocably to the crown all the acquisitions of its kings.

§ 66.
Who are to decide the disputes relating to the succession to a sovereignty.

The same principles also furnish us with the solution of a celebrated question. When the right of succession becomes uncertain in a successive or hereditary state, and two or three competitors lay claim to the crown; it is asked, Who shall be the judge of their pretensions? Some learned men, resting on the opinion that sovereigns acknowledge no other judge but God,

* Memorial in behalf of Madame de Longueville, touching the principality of Neuchâtel, in 1672.

† It must be observed, that these partitions ought not to be made without the approbation and consent of the respective states.

have maintained, that the competitors for the crown, while their right is uncertain, ought either to come to an amicable agreement, and enter into articles among themselves, or to chuse arbitrators, to have recourse to lots, or, in short, to determine the dispute by arms; and that the subjects cannot in any manner decide the question. It is astonishing that celebrated authors should have maintained such a doctrine. But even in speculative philosophy, there is nothing so absurd as not to have been advanced by some philosophers*; indeed little can be expected from the human mind, when seduced by interest or fear. What! in a question that concerns none so much as the nation, that relates to a power established only with a view to the happiness of the people; in a quarrel that is going to decide for ever their most valuable interests, and their very safety, are they to stand by as tranquil spectators! Are they to allow strangers, by the blind lot of arms, to appoint them a master, as a flock of sheep is to wait till it is determined, whether they are to be delivered up to the butcher, or restored to the shepherd's care!

But, say they, the nation has stripped itself of all jurisdiction, by giving it to a sovereign; it has submitted to the reigning family, it has given to those who are descended from that family a right which nobody can take from them: it has established them its superiors; and can no longer judge them. Very well! But ought not this nation to know to whom it is bound, and to prevent its being delivered up to another? And since it has established the law of succession; who can better, who has greater right to appoint him whom the fundamental law has provided and pointed out? Let us say then, without hesitation, that the decision of this grand controversy belongs to the nation, and to the nation alone. If even the competitors have agreed among themselves, or have chosen arbitrators, the nation is not obliged to submit to what they have thus regulated, unless it has consented to the transaction or compromise; princes not acknowledged, and whose right is uncertain, not being in any manner able to dispose of its obedience. It can acknowledge no judge over it in an affair that relates to its most sacred duties, and most precious rights.

Grotius and Puffendorf differ in reality but little from this opinion; but would not have it called the decision of the people, or state, or a juridical sentence (*judicium jurisdictionis*). And we shall not dispute about words. However, more here is required than a mere examination of their rights, in order to submit to that competitor who has the best. All the disputes that arise in society ought to be judged and decided by the public authority. As soon as the right of succession is found uncertain, the sovereign authority returns for a time to the body of the state, which ought to exercise it, either by itself, or by its representatives, till the true sovereign be known. "The contest on this

* Nescio quomodo nihil tam absurdè dici potest, quod non dicatur ab aliquo philosophorum. *Cicero, de Divinat. Lib. II.*

"right suspending the functions in the person of the sovereign, the authority naturally returns to the subjects, not to be retained by them, but to allow them to prove on which of the competitors it lawfully devolves, in whose hands they are at length to place it. It would not be difficult to support, by an infinite number of examples, a truth so evident by the light of reason: it is sufficient to remember, that the states of France, after the death of Charles the Fair, terminated the famous dispute between Philip de Valois and the king of England (Edward III.) and that these states, though subject to him in whose favour they granted the decision, were nevertheless the judges of the dispute *."

Guichardin, book XII. also shews that the states of Arragon decided the succession to that kingdom, in favour of Ferdinand, the grandfather of Ferdinand, the husband of Isabella Queen of Castile, in preference to the other relations of Martin king of Arragon, who pretended that the kingdom belonged to them †.

It was also the states who, in the kingdom of Jerusalem, decided the disputes of those who made pretensions to it; as is justified by several examples in the foreign political history ‡.

The states of the principality of Neuchâtel have often pronounced, in form, a juridical sentence on the succession of the sovereignty. In the year 1707, they decided between a great number of competitors, when their decision in favour of the king of Prussia was acknowledged by all Europe in the treaty of Utrecht.

§ 6.-
That the
right of the
succession
ought not
to depend
on the judgment of a
foreign
power.

The better to secure the succession in a certain and invariable order, it is at present established in all Christian states (Portugal excepted) that no descendant of the sovereign can succeed to the crown, if he is not born in marriage conformably to the laws of the country. As the nation has established the succession, to the nation alone belongs the power of acknowledging those who are capable of succeeding; and consequently, on its judgment and laws alone must depend the validity of the marriage of its sovereigns, and the legitimacy of their birth.

If education had not the power of familiarizing the human mind to the greatest absurdities, is there a wise man who would not be struck with astonishment at seeing so many nations suffer the legitimacy and right of their princes to depend on a foreign power? The court of Rome has invented an infinite number of obstructions and nullities in marriages, and at the same time arrogates to itself the right of judging of their validity, and of raising obstructions; so that a prince of its communion cannot in certain cases be so much his own master, as to contract a marriage necessary to the safety of the state. Jane, the only daughter of Henry IV. king of Castile, found this true by experience. Some

* The answer in behalf of Madame de Longueville, to a memorial in behalf of Madame de Nemours.

† Ibid.

‡ See the same memorial, which quotes P. Labbe's Royal Abridgement, page 501. and following.

rebels published abroad that she owed her birth to Bertrand de la Cueva, the king's favourite; and in spite of the declarations and last will of that prince, who constantly acknowledged Jane for his daughter, and nominated her his heiress, they called to the crown Isabella, Henry's sister, and the wife of Ferdinand heir of Arragon. The grandees of Jane's party had provided a powerful resource, by negotiating a marriage with Alphonso king of Portugal; but as that prince was Jane's uncle, it was necessary to obtain a dispensation from the pope; and Pius II. who was in the interest of Ferdinand and Isabella, refused to grant the dispensation, though such alliances were then very common. These difficulties cooled the ardour of the Portuguese monarch, and abated the zeal of the faithful Castilians. Every thing succeeded with Isabella, and the unfortunate Jane took the veil, in order to secure, by this heroic sacrifice, the peace of Castile*.

If the prince proceeds and marries, notwithstanding the pope's refusal, he exposes his dominions to the most fatal troubles. What would have become of England, if the reformation had not been happily established, when the pope presumed to declare Queen Elizabeth illegitimate, and incapable of wearing the crown.

Lewis of Bavaria, a great emperor, here boldly claimed the rights of his crown. We see in the diplomatic code of the law of nations by Leibnitz † two acts, in which that prince condemns, as an invasion of the imperial authority, the doctrine that attributes to any other power but his own, the right of granting dispensations, and of judging of the validity of marriages, in the places under his obedience; but he was neither well supported in his lifetime, nor imitated by his successors.

There are, in fine, states in which the sovereign may chuse his successor, and even transfer the crown to another during his life: these are commonly called *patrimonial* kingdoms or states: but

§ 68.

Of states called *patrimonial*.

* I take this historical passage from *M. Du Port de Tertres's Conspiracies*, for I have not the original historians by me. However, I do not enter into the question relating to the birth of Jane: this would here be of no use. The princefs had not been declared a bastard according to the laws; the king acknowledged her for his daughter; and besides, whether she was or was not legitimate, the inconveniences that followed from the pope's refusal remained the same, both with respect to her and the king of Portugal.

† P. 154. *Forma divortii matrimonialis inter Johannem filium regis Bohemiae & Margaretam ducissam Karinthiae.* This divorce is given by the emperor on account of the impotency of the husband; *per auctoritatem*, says he, *nobis rite debitam & concessam.*

P. 156. *Forma dispensationis super affinitate consanguinitatis inter Ludovicum marchionem Brandenburg & Margaretam ducissam Karinthiae, nec non legitimatio liberorum procreandorum, facta per dom. Ludovic. IV. Rom imper.*

It is only an human law, says the emperor, that hinders these marriages, *infra gradus affinitatis sanguinis praesertim infra fratres & sorores.* De cujus legis praecipitis dispensare solummodo pertinet ad auctoritatem imperatoris seu principis Romanorum. He at length opposes and condemns the opinion of those who dared to say that these dispensations depended on ecclesiastics. Both this act and the former are dated in the year 1341.

let

let us reject so unjust and so improper an epithet, which can only serve to raise in the minds of sovereigns, ideas very opposite to those they ought to entertain. We have shewn (§ 61.) that a state cannot be a patrimony. But it may happen that a nation, either as an effect of an entire confidence in the prince, or from some other reason, has entrusted him with the care of appointing a successor, and even consented to receive, if he thinks proper, another sovereign from his hands. Thus we see Peter I. emperor of Russia, nominated his wife to succeed him, though he had children.

§ 62.
All true sovereignty is unalienable.

But when a prince chuses his successor, or when he cedes the crown to another, he properly only nominates, in virtue of the power with which he is entrusted, either expressly, or by a tacit consent, him who is to govern the state after him. This neither is nor can be an alienation, properly so called. Every true sovereignty is unalienable in its own nature. We shall be easily convinced of this, if we pay attention to the origin and end of political society, and of the supreme authority. A nation becomes incorporated into a society, to labour for the common welfare, as it shall think proper, by living according to wholesome laws. With this view it establishes a public authority. If it trusts this authority to a prince, even with the power of transmitting it into other hands, this can never be, at least by the express and unanimous consent of the citizens, with the right of really alienating or subjecting the state to another body politic: for the individuals who have formed this society are entered into it in order to live in an independent state, and not under a foreign yoke. Let them not oppose against us any other source of this right; as conquest, for instance; for we have already shewn (§ 60.) that these different sources return at length to the true principles on which all just governments are founded. While the victor does not treat his conquests according to these principles, the state of war still in some measure subsists. At the moment when he places it in a civil state, his rights are proportioned by the principles of the state.

I know that many authors, and particularly Grotius*, give long enumerations of the alienations of sovereignties. But examples frequently prove only the abuses that have been made of power, and not what is right. And besides, the people consented to the alienation, either willingly or by force. What could the inhabitants of Pergamos, Bithynia, and Cyrene do, when their kings gave them, by their last wills, to the Roman people? Nothing remained for them, but the part of submitting with a good grace to so powerful a legatee. In alledging an example capable of serving as an authority, it was necessary for them to have excited that of a people resisting a like disposition of their sovereign, and that resistance being generally condemned as unjust and rebellious. Had Peter I. who nominated his wife to succeed

* *De Jure Belli & Pacis*, Lib. I. Cap. III. § XII.

him, been willing to subject his empire to the grand seignor, or to some other neighbouring power; can we believe that the Russians would have suffered it, and that their resistance would have passed for a revolt? We do not find in Europe any great state that is reputed alienable. If some petty principalities have been considered as such, it is because they were not true sovereignties. They arose in the empire with greater or less liberty: their masters made a traffic of the rights they possessed in these territories: but they could not withdraw them from a dependence on the empire.

Let us conclude then, that nations alone have the right of submitting to a foreign power; for the right of really alienating the state, can never belong to the sovereign, unless it be given him by the entire body of the people. That of nominating the successor, or committing the sceptre to other hands, must also be presumed, and ought to be founded on an express consent, on a law of the state, or on long custom, justified by the tacit consent of the people.

If the power of nominating a successor is trusted to the sovereign, he ought to have no other view in his choice, but the advantage and safety of the state. He himself was established only for this end (§ 39.); the liberty of conferring his power on another, could then be only granted him with the same view. It would be absurd to consider a prerogative of use to the prince, of which he might make his private advantage. Peter the Great proposed only the welfare of the empire when he left the crown to his wife. He knew that heroine was most capable of following his views, and of perfecting the great things he had begun, and therefore preferred her to his son, who was still very young. If we often found on the throne such elevated minds as Peter's, a nation could not take wiser measures in order to be well governed, than to trust the prince, by a fundamental law, with the power of appointing his successor. This measure would be much better than the order of birth. The Roman emperors who had no male children appointed a successor by adoption. Rome was obliged to this custom for a series of sovereigns unequalled in history: Nerva, Trajan, Adrian himself, and Marcus Aurelius; what princes! Does the right of birth often place such on the throne?

We may go still farther, and boldly say, that in an act of such importance to the safety of the entire nation, the tacit consent and ratification of the people or state, is at least necessary, to give it a full and entire effect. If an emperor of Russia had thought proper to nominate for his successor a subject notoriously unworthy of the crown, it is not at all probable that such a vast empire would have blindly submitted to so pernicious an appointment. And who would presume to blame a nation for refusing to be ruined, out of respect to the last orders of its prince? As soon as the people

§ 70.
The duty
of a prince
who uci-
minates his
successor.

§ 71.
He must
have at least
a tacit rati-
fication.

people submits to the sovereign appointed to rule over them, they tacitly ratify the choice made by the last prince; and the new monarch enters into all the rights of his predecessor.

C H A P. VI.

The principal Objects of a good Government; and first; on providing for the Necessities of the Nation.

§ 72.
The end of
society
shews the
sovereign
his duties
1. He ought
to procure
plenty.

AFTER these observations on the constitution of the state itself, we come now to the principal objects of a good government. We have seen above (§ 41, and 42) that the prince, on his being invested with the sovereign authority, is entrusted with the duties of the nation in relation to government. In treating of the objects of a wise administration, we must then shew the duties of a nation towards itself, and those of the sovereign towards his people.

A wise conductor of the state will find in the end of civil society the general rule and indication of his duties. The society is established with the view of procuring, to those who are its members, the necessaries, conveniences, and even accommodations of life; and in general, every thing necessary to their felicity; to take such measures that each may peacefully enjoy his own property, and obtain justice with safety; and, in short, to defend the whole from all violence from without. (§ 15.) The nation, or its conductor, should first apply to the business of providing for all the wants of the people, and producing a happy plenty of all the necessaries of life, with its conveniences, and innocent and laudable enjoyments. As an easy life without sloth contributes to the happiness of men, they are thus placed in a condition to labour with greater safety and success after their own perfection, which is their grand and principal duty, and one of the views they ought to propose by uniting in society.

§ 73.
To take care of there
being a sufficient number of
workmen.

To succeed in procuring this abundance of every thing, it is necessary to take care that they have a sufficient number of able workmen, in every useful or necessary profession. An authentic application to government, wise regulations, and assistance, properly granted, will produce this effect, without using constraint, which is always fatal to industry.

§ 74.
To hinder the departure of those
that are useful.

Those workmen that are useful ought to be retained in the state; and in this the public authority has certainly a right of using restraint, if it be found necessary to succeed in it. Every citizen owes this to his country; and an artist, in particular, who is nourished, educated, and instructed, in its bosom, cannot lawfully leave it, and carry to strangers an industry which he learnt at home; unless his country has no occasion for him, or he cannot there obtain the just fruit of his labour and abilities. Business must then be procured for him; and if, while able to obtain an honest livelihood in his own country, he would for no reason abandon it, the state has a right to prevent him. But

a very moderate use ought to be made of this right, and only in important or necessary cases. Liberty is the soul of abilities and industry; frequently a workman or an artist, after having travelled abroad, is recalled home by a natural sensation, more able and better qualified to serve his country than before. If certain cases be excepted, it is best in this affair to practise the mild methods of protection, encouragement, &c. and to leave the rest to that natural love felt by all men for the places of their birth.

As to those emissaries who come into a country to entice away useful subjects; the sovereign has a right to punish them severely, and has just cause of complaint against the power by whom they are employed. § 75.
Of the emissaries who entice them away.

We shall treat elsewhere more particularly of the general question, whether a citizen is permitted to leave the society of which he is a member. The particular reasons relating to useful workmen are sufficient here.

The state ought to encourage labour, to animate industry, and to excite abilities; to propose honours, rewards, privileges; and to take such measures that any one may live by his industry. Here England deserves to be proposed for an example. The parliament incessantly attends to these important affairs, in which neither care nor expence is spared. And do we not even see a society of excellent citizens, formed with this view, and devote considerable sums to this use? Prizes are also distributed in Ireland to the mechanics, husbandmen, and who most distinguish themselves. Can such a state fail of being powerful and happy? § 76.
They ought to encourage labour and industry.

C H A P. VII.

Of the Cultivation of the Earth.

OF all the arts, tillage, or agriculture, is doubtless the most useful and necessary. It is the nursing father of the state. The cultivation of the earth causes it to produce an infinite increase; it forms the surest resource, and the most solid funds of riches and commerce, for the people who enjoy an happy climate. § 77.
The utility of tillage.

This affair then deserves the utmost attention of the government. The sovereign ought to neglect no means of rendering the land under his obedience as well cultivated as possible. He ought not to allow either communities or private persons to acquire large tracts of land in order to leave it uncultivated. These rights of *common*, which deprive the proprietor of the free liberty of disposing of his lands, that will not allow him to farm them, and to cause them to be cultivated in the most advantageous manner; these rights, I say, are contrary to the welfare of the state, and ought to be suppressed, or reduced to just bounds. The property introduced among the citizens, does not prevent the nation's having a right to take the most effectual measures to cause the whole § 78:
The measures necessary in this respect. On the distribution of the lands.

whole country to produce the greatest and most advantageous revenue possible.

§ 79.
On the pro-
tection of
husband-
men.

The government ought carefully to avoid every thing capable of discouraging the husbandman, or of diverting him from the labours of agriculture. Those taxes, those excessive and ill-proportioned impositions, the burthen of which falls almost entirely on the cultivators; and the vexations they suffer from the commissioners who levy them, take from the unhappy peasant the means of cultivating the earth, and depopulate the country. Spain is the most fertile, and the worst cultivated country in Europe. The church possesses too much land, and the undertakers of the royal magazines, who are authorized to purchase at a low price, all the corn they find in the possession of a peasant, above what is necessary for the subsistence of himself and his family, so greatly discourage the husbandman, that he sows no more corn than is necessary for the support of his own household. Whence frequently arises the greatest scarcity in a country capable of feeding its neighbours.

§ 80.
The hus-
bandmen
ought to be
held in
esteem.

Another abuse injurious to agriculture is, the contempt cast upon the husbandman. The inhabitants of cities, even the most servile artists, and the most lazy citizens, consider him that cultivates the earth with a disdainful eye; they humble and discourage him: they dare to despise a profession that feeds the human race; the natural employment of man. A little insignificant stay-maker, or a taylor, places far beneath him the beloved employment of the first consuls and dictators of Rome! China has wisely prevented this abuse; agriculture is there held in honour; and to preserve this happy manner of thinking, every year, on a solemn day, the emperor himself, followed by his whole court, sets his hand to the plough, and sows a small piece of land. Hence China is the best cultivated country in the world: it nourishes an innumerable multitude of people, that at first appears to the traveller too great for the space they possess.

§ 81.
The culti-
vation of
the earth, a
natural
obligation.

The cultivation of the soil is not only to be recommended by the government, on account of the extraordinary advantages that flow from it; but from its being an obligation imposed by nature on mankind. The whole earth is appointed for the nourishment of its inhabitants: but it would be incapable of doing it, was it uncultivated. Every nation is then obliged by the law of nature to cultivate the ground that has fallen to its share; and it has no right to expect or require assistance from others, any farther than as the land in its possession is incapable of furnishing it with necessaries. Those people, like the ancient Germans, and the modern Tartars, who having fertile countries, disdain to cultivate the earth, and chuse rather to live by rapine, are wanting to themselves, and deserve to be exterminated as savage and pernicious beasts. There are others, who, to avoid agriculture, would live only by hunting, and their flocks. This might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its few inhabitants.

bitants. But at present, when the human race is so greatly multiplied, it could not subsist, if all nations resolved to live in that manner. Those who still retain this idle life, usurp more extensive territories, than they would have occasion for, were they to use honest labour, and have therefore no reason to complain, if other nations, more laborious, and too closely confined, come to possess a part. Thus, though the conquest of the civilised empires of Peru and Mexico were a notorious usurpation, the establishment of many colonies on the continent of North America may, on their confining themselves within just bounds, be extremely lawful. The people of these vast countries rather overran than inhabited them.

The establishment of public granaries is an excellent regulation for preventing scarcity. But great care should be taken to prevent their being managed with a mercantile spirit, and with views of profit. This would render them a monopoly, which would not be the less unlawful, from its being carried on by the magistrate. These granaries should be filled in times of the greatest plenty, and take off the corn that would lie on the husbandman's hands, or be carried in too great quantities to foreigners; they should be opened when corn is dear, and kept at a just price. If in a time of plenty they prevent this necessary commodity from easily falling to a very low price, this inconvenience is more than remedied by the relief they afford in dear times: or rather, no inconvenience ever arises from them. When corn is sold extremely cheap, the manufacturer is tempted to undersell his neighbours, by offering his goods at a price which he is afterwards obliged to raise; and this produces great disorders in commerce, by putting it out of its course; or he accustoms himself to an easy life, which he cannot support in harder times. It would be of advantage both to the manufacturers and to commerce, to have the subsistence of the workmen kept at a moderate, and nearly equal price. In short, public granaries keep in the state the corn that would be sent abroad at too cheap a rate, and must be purchased again, and brought home at a very great expence after a bad harvest; which is a real loss to the nation. These establishments, however, will not hinder the corn trade. If the country, in a common year, produces more than is sufficient for the nourishment of the inhabitants, the superfluity may be sent abroad; but it will be sold at a more just and reasonable price.

§ 81.
Of public
granaries.

C H A P. VIII.

Of Commerce.

BY means of commerce, particular persons, and whole nations may procure what they have occasion for, and is not to be found at home. Commerce is divided into home, and foreign trade. The first is that carried on in the state between the several inhabitants; and the second is carried on with foreign nations.

§ 82.
Of home
and foreign
trade.

D

The

§ 84.
The utility
of a home
trade.

The home trade of a nation is of great use; it furnishes all the citizens with the means of procuring whatever they want, as either necessary, useful, or agreeable; it causes a circulation of money, creates industry, animates labour, and by affording subsistence to a great number of subjects, contributes to render the country more populous and flourishing.

§ 85.
The utility
of foreign
trade.

The same reasons shew the use of foreign trade, which is moreover attended with these advantages. 1. By trading with foreigners, a nation procures such things as neither nature nor art can furnish in that country. And secondly, if it be properly directed, it increases the riches of the nation, and may become the source of wealth and plenty. Of this the example of the Carthaginians among the ancients, and that of the English and Dutch among the moderns, afford remarkable proofs. Carthage, by her riches, counter-balanced the fortune, courage, and grandeur of Rome. Holland has amassed immense sums in her marshes; a company of her merchants possesses kingdoms in the East, and the governor of Batavia commands as king of the Indies. To what a degree of power and glory is England arrived! formerly her kings and warlike people made the most glorious conquests, which the reverses, so frequent in war, made them lose: at present, it is principally commerce that places in her hand the balance of Europe.

§ 86.
The obligation
to encourage
a home
trade.

Nations are obliged to cultivate a home trade: first, because we shall then fulfil the law of nature, which requires that men should mutually assist each other, and contribute as much as is in their power to the perfection and happiness of beings like themselves; whence it follows, that after the introduction of property, the obligation must take place, of resigning to others, at a just price, what they have occasion for, and what we do not appropriate to our own use. Secondly, society being established with the view that each may procure whatever things are necessary to his own perfection and happiness, and a home trade being the means of obtaining them, the obligations to carry on and improve this trade, are derived from the very contract on which the society was formed. In fine, this commerce being of advantage to the nation, it is obliged, as a duty to itself, to render it flourishing.

§ 87.
The obligation
to carry on a
foreign trade.

From the same reason, drawn from the welfare of the state, and to procure for the citizens every thing they want, a nation is obliged to promote and carry on a foreign trade. Of all the modern states, England is most distinguished in this respect. The parliament have always their eyes fixed on this important interest; they effectually protect the navigation of the merchants, and favour, by considerable gratifications, the exportation of superfluous commodities and merchandises. We may see in a very good work *, the great advantages this kingdom has derived from so wise a conduct.

* Remarks on the Advantages and Disadvantages of France and Great Britain in relation to Commerce.

Let us now see what are the laws of nature and nations in respect to the commerce they carry on with each other. Men are obliged mutually to assist each other as much as possible; in order to contribute to the perfection and happiness of beings like themselves (Prelim. § 10.) whence it follows, as we have just said (§ 86.) that after the introduction of property, it became a duty to sell to each other at a just price, what the possessor himself had no occasion for, and what is necessary to others; because, since this introduction of property, no man could any other way procure whatever he found necessary or useful, or what was proper to render life sweet and agreeable. Since then the law springs from the obligation (Prelim. § 3.); that we have just established, gives every man the right of procuring the things he wants, by buying them at a reasonable price of those who have themselves no occasion for them.

§ 88.
The foundation of the laws on commerce. On the right of buying.

We have also seen (Prelim. § 5.) that men could not free themselves from the authority of the laws of nature, by uniting in civil society, and that the whole nation remains subject to the same laws in its national capacity; so that the natural and necessary law of nations, is no other than the law of nature properly applied to nations or sovereign states (Prelim. § 6.): from all which follows, that a nation has a right to procure, at an equitable price, whatever it wants, on purchasing them of people who have no occasion for them. This is the foundation of the right of commerce between different nations, and in particular of the right of buying.

We cannot apply the same reasoning, to the right of selling such things as we want to part with. Every man and every nation being perfectly at liberty to buy a thing that is to be sold, or not to buy it, and to buy it of one rather than of another; the law of nature gives to no person whatsoever the least kind of right to sell what belongs to him to another who does not want to buy; neither has any nation that of selling its commodities or merchandise to a people who are unwilling to have them.

§ 89.
Of the right of selling.

Every state has, consequently, a right to prohibit the entrance of foreign merchandise, and the people who are interested in this prohibition have no right to complain of it, as if they had been refused an office of humanity. Their complaints would be ridiculous, since they would only be caused by a want of that gain, refused by a nation that would not suffer it to be made at its own expence. It is however, true, that if a nation was very certain that the prohibition of its merchandises was not founded on any reason drawn from the welfare of the state that prohibited them, it would have cause to consider this conduct, as a mark of ill-will shewn in this instance, and to complain of it on that footing. But it would be very difficult to form a certain judgment, that the state had no solid nor apparent reason for making such a prohibition.

§ 90.
Of the prohibition of foreign merchandises.

By the manner in which we have shewn a nation's right to buy of another what it wants, it is easy to see, that this right is not

§ 91.
The nature of the right one of buying.

one of those called *perfect*, and that are accompanied with a right of constraint. Let us now distinctly explain the nature of a right, that may give room for questions of a very serious nature. You have a right to buy of others such things as you want, and of which they themselves have no need; you address yourself to me: I am not obliged to sell them to you, if I have any occasion for them. In virtue of the natural liberty that belongs to all men, I am to judge whether it is prudent for me to keep them or to sell them to you; and you have no right to determine whether I judge well or ill, because you have no authority over me. If I, improperly, and without any good reason, refuse to sell at a just price what you want, I offend against my duty; you may complain of this: but you ought to bear it, and you cannot attempt to force me, without violating my natural right, and doing me an injury. The right of buying the things we want, is then only an imperfect right, like that of a poor man, to receive alms of the rich; if he refuses him, the poor man may justly complain; but he has no right to take it by force.

If it be demanded, what a nation has a right to do in the case of an extreme necessity? This question will be answered in its proper place in the following book, Chap. IX.

§ 92.
Every nation is to chuse how far it will engage in commerce.

Since then a nation cannot have a natural right to sell its merchandizes to another, that is unwilling to purchase them; if it has only an imperfect right to buy what it wants of others; if it belongs only to these last to judge whether it be proper for them to sell or not; and, in short, if commerce consists in mutually buying and selling all sorts of commodities, it is evident, that it depends on the will of any nation to carry on a commerce with each other, or to let it alone. If it is willing to allow this to one, it depends on the nation to permit it, under such conditions as it shall think proper. For in permitting another nation to trade with it, it grants that other a right, and every one is at liberty to affix what conditions he pleases to a right he freely grants.

§ 93.
How a nation acquires a perfect right to a foreign trade.

Men and sovereign states may, by their promises, enter into a perfect obligation with respect to each other, in things where nature has made only an imperfect obligation. A nation not having naturally a perfect right to carry on a commerce with another, may procure it by an agreement or treaty. This right is then acquired only by treaties, and relates to that branch of the law of nations termed *conventional* (Prelim. § 24.) The treaty that gives the right of commerce, is then the measure and rule of this right.

§ 94.
Of the simple permission of commerce.

A simple permission of carrying on a commerce with a nation, gives no perfect right to that commerce. For if I merely and simply permit you to do any thing, I do not give you any right to do it afterwards in spite of me; you may make use of my condescension as long as it lasts; but nothing can hinder my changing my will. As then every nation has a right to chuse whether it will or will not trade with another, and on what conditions it

is willing to do it (§ 92.) ; if a nation has suffered by another's coming to trade in the country, it is at liberty to prohibit, restrain, or subject that commerce to certain regulations, and the people who carry it on, cannot complain of injustice.

Let us only observe, that nations, as well as individuals, are obliged to trade together for the common benefit of the human race, on account of the necessity men are under with regard to mutual assistance, (Prelim. § 10, 11, and Book I. § 38.) : but this does not prevent any one's being at liberty to consider, in particular cases, if it is convenient to encourage, or permit the commerce ; and as the duties towards itself, are superior to those it owes to another ; if one nation finds itself in such circumstances, that it judges trading with foreigners dangerous to the state, it may give it up, and prohibit it. This the Chinese have done for a long time together. But once more, it is necessary that its duties towards itself should prescribe this conduct, from very serious and important reasons ; otherwise, it could not refuse to comply with the general duties of humanity.

We have seen what are the laws nations derive from nature, with regard to commerce, and how they may procure others by treaties : let us see if they can found any on long custom. To determine this question in a solid manner, it is necessary first to observe, that there are rights which consist in a simple power : they are called in Latin, *jura mere facultatis*, rights of mere ability. They are such in their own nature, that he who possesses them may use them or not, as he thinks proper, he being absolutely free from all restraint in this respect ; so that the actions that relate to the exercise of these rights, are acts of mere free will, that may be done or not done according to pleasure. It is manifest that rights of this kind cannot be lost by prescription, on account of their not being used, since the prescription is only founded on a lawful consent presumed, and if I possess a right which in its own nature I may, or may not use, as I think proper, without any person having a right to prescribe to me on that subject, it cannot be presumed, that if I have been long without making use of it, I therefore intend to abandon it. This right is then imprescriptible, at least, if I am not forbid, and hindered from making use of it, and have obeyed with sufficient marks of consent. Let us suppose, for instance, that I am entirely at liberty to grind my corn at any mill I please, and that during a very considerable time, an age if you will, I make use of the same mill ; as I have done in this respect what I thought proper, nobody can presume from this use of the same mill, that I would deprive myself of the right of grinding in any other ; and consequently, my right cannot be lost by prescription. But now suppose, that resolving to make use of another mill, the master of this opposes it, and makes me sign a prohibition ; if I obey his prohibition without necessity, and without opposition, though I know my right, and have it in my power to defend myself, this right is lost ; because my conduct gives just room to presume,

§ 97.
If the laws relating to commerce are subject to prescription.

that I chose to abandon it. Let us apply these principles. Since it depends on the will of any nation to carry on a commerce with another, or not to carry it on, and to regulate the manner in which it would make use of it (§ 92.) the right of commerce is evidently a right of mere ability (*jus meræ facultatis*), a simple power, and consequently is imprescriptible. Thus when two nations have traded together, without interruption, during a century, this long use does not give any right to either of them, and one is not obliged on this account, to suffer the other to come and sell its merchandises, or to buy others: both preserve the double right of prohibiting the entrance of foreign merchandize, and of selling their's wherever the people are willing to buy them. If the English have from time immemorial been accustomed to fetch their wines from Portugal, they are not on that account obliged to continue the trade, and have not lost the liberty of purchasing their wines elsewhere. If, in the same manner, they have for a very long time sold their cloth in this kingdom, they have, nevertheless, a right to transfer that trade to any other country: and, reciprocally, the Portuguese are not obliged by this long custom, either to sell their wines to the English, or to purchase their cloths. If a nation desires any right of commerce, that does not depend on the will of another, it is necessary to procure it by treaty.

§ 96.
The imprescriptibility of those founded on treaty.

What has been just said, may be applied to the rights of commerce acquired by treaties. If a nation has by this method procured the liberty of selling certain merchandizes to another, it does not lose its right, though a great number of years are suffered to be passed over without its being used; because this right is a simple power, *jus meræ facultatis*, which it is at liberty to use or not, whenever it pleases.

Certain circumstances however, may render a different decision necessary, because they imply a change in the nature of the right in question. For example, if it appears evident, that the nation granting this right, granted it only with the view of procuring a species of merchandize of which it was then in want; that which obtained the right of selling, neglecting to furnish these merchandizes, and another offering to bring them regularly, on condition of having an exclusive privilege, it may certainly grant that exclusive privilege: the nation that had this right of selling, would thus lose it, because it had not fulfilled the tacit condition.

§ 97.
Of monopolies, and trading companies, with exclusive privileges.

Commerce is a common benefit to a nation, and all its members have an equal right to it. A monopoly is therefore, in general, contrary to the rights of the citizens. However, this rule has its exceptions, taken even from the welfare of the nation and a wise government may, in certain cases, justly establish a monopoly. There are commercial enterprises that cannot be carried on without a strength that requires considerable funds, which surpasss the ability of single persons. There are others that would

would soon become ruinous, were they not conducted with great prudence with one regular spirit, and according to well-supported maxims and rules: these foreign trades cannot be separately carried on by individuals; companies are therefore formed, under the authority of government, and these companies cannot be supported without an exclusive privilege. It is then for the advantage of the nation to grant them: hence has arisen in several countries, those powerful companies that carry on the commerce of the East. When the subjects of the United Provinces established themselves in the Indies, on the ruin of their enemies the Portuguese, separate merchants did not dare to think of such an enterprise, and the state itself wholly taken up in the defence of its liberty against the Spaniards, had not the means of attempting it.

There can then be no doubt that when a branch of commerce, or a manufacture, is out of a nation's power to carry it on any other way, if a number of persons offer to establish it, on condition of having an exclusive privilege, the sovereign may very justly grant it.

But whenever a commerce may be left open to a nation, without being of the least disadvantage to the state, the granting certain privileges to some citizens, is offering an injury to the rights of others. And even then, when such a commerce requires considerable expences to maintain forts, men of war, &c. this being a national affair, the state may defray these expences, and, as encouragement to industry, leave the profits of the trade to the merchants. This is sometimes done in England.

The conductor of a nation ought to take particular care to encourage the commerce that is of advantage to his people, and to suppress or lay restraints upon that which is to their disadvantage. Gold and silver being become the common standard of the value of all the articles of commerce, the trade that brings into the state a greater quantity of these metals than it carries out, is of advantage; and, on the contrary, that is ruinous which causes more gold and silver to be sent abroad, than it brings home. This is what is called the balance of trade. The ability of those who have the direction of it, consists in making that balance turn in favour of the nation.

Of all the measures that may be taken by a government, we shall only touch here on the rights of entry. When the conductors of a state, without abolishing a particular trade, would divert it from that channel, they lay such an extraordinary duty on the merchandizes they would discourage, as will prevent their consumption. Thus French wines are usually charged with very high duties in England, while the duties on those of Portugal are much more moderate; because England sells few of its productions to France, while she sells abundantly more to Portugal. There is nothing in this conduct that is not very wise and extremely just, and France has no reason to complain of it, every nation

§ 98.

Of the balance of trade, and the attention of the government in this respect.

§ 99.

Of the rights of entry.

having an undoubted right to make what conditions it thinks proper, with respect to receiving foreign merchandizes, and may even refuse to receive them at all.

C H A P. IX.

Of the Care of the public Ways of Communication, and the Right of Toll.

§ 100.
Of the use
of high-
ways, ca-
nals, &c.

THE use of high-ways, bridges, canals, and, in a word, of all safe and commodious ways of communication, cannot be doubted. They facilitate the trade between one place and another, and render the conveyance of merchandise less expensive, as well as more sure and easy. The merchants are enabled to sell at a better price, and to obtain the preference; they draw strangers, who travel through the country, and leave money at the places through which they pass. France and Holland have daily found the truth of this, by happy experience.

§ 101.
The duties
of the go-
vernment in
this respect.

One of the principal things that ought to employ the attention of the government, with respect to the welfare of the public in general, and of trade in particular, must then relate to the highways, canals, &c. in which nothing ought to be neglected to render them safe and commodious. France is one of those states where this duty to the public is discharged with the greatest attention and magnificence. Numbers of the patrols every where render the traveller free from danger; and noble causeways, bridges, and canals, facilitate the communication between one province and another: Lewis XIV. joined the two seas by a work worthy of the Romans.

§ 102.
Of its rights
in this re-
spect.

The whole nation ought, doubtless, to contribute to such useful undertakings. When therefore, the laying out and repairing of high-ways, bridges, and canals, would be too great a burthen to be discharged out of the ordinary revenues of the state, the government may oblige the people to labour at them, or to contribute to the expence. There have been peasants in some of the provinces of France, who murmured at the labours imposed upon them for the construction of causeways; but experience no sooner made them sensible of their true interest, than they blessed the authors of so useful a design.

§ 103.
The founda-
tion of
the right of
toll.

The construction and preservation of all these works being attended with great expence, the nation may very justly oblige all those to contribute to them, who receive advantage from their use: this is the lawful source of the right of toll. It is just, that a traveller, and especially a merchant, who receives advantage from a bridge, a canal, or a causeway, in his own passage, and in conveying more commodiously his merchandise, should contribute to the expence of these useful establishments, by a moderate contribution; and if the state thinks proper to exempt the citizens from

from paying it, it is under no obligation to gratify strangers in this particular.

But a law so just in its origin, frequently degenerates into a great abuse. There are countries where no care is taken of the high-ways, and where they nevertheless require considerable tolls. A particular lord who has a neck of land that projects into a river, shall there establish a toll; though he is not at a farthing's expence in preserving the river and the convenience of navigation. This is a manifest extortion, contrary to the natural law of nations. For a division and property in lands can deprive nobody of the right of passage, when not the least injury is done to him, or the territory by which we pass. Every man receives this right from nature, and cannot justly be forced to purchase it.

But the arbitrary or *customary* law of nations at present tolerates this abuse, while it is not carried to such an excess as to destroy commerce. However, people submit to them without difficulty, only on account of their being established by ancient custom: but the imposition of new tolls is often a source of disputes. The Swiss formerly made war on the dukes of Milan, on account of the oppressions of this nature. This right of tolls is also still abused, when the passenger is obliged to contribute too much, and what bears no proportion to the expence of preserving these public passages.

At present to avoid all difficulty and oppression, nations settle these points by treaties.

CHAP. X.

Of Money and Exchange.

IN the first age, after the introduction of property, people exchanged their commodities and superfluous effects for those they wanted: but afterwards gold and silver became the common standard of the value of all things: and at length, the people, to prevent their being deceived, contrived to impress on pieces of gold and silver the name of the state, the figure of the prince, or some other impression, as the seal and pledge of its value. This institution is of great use and infinite convenience: it is easy to see what an advantage it is to trade. Nations or sovereignties cannot therefore apply too closely to an affair of such importance.

The impression made on money becoming the seal of its standard and weight, it was soon found, that every person without distinction ought not to be permitted to coin it; for by that means, frauds would become too common; it would soon lose the public confidence; and this would destroy a most useful institution. Hence money is coined by the authority, and in the name of the state or prince, who are its surety; they ought then to have a quan-

§ 104.
On the
abuse of
this right.

§ 105.
Of the estab-
lishment
of money.

§ 106.
The duty of
the nation
or prince
with re-
spect to
money.

a quantity of it coined sufficient to answer the necessities of the country, and to take care that it be good, that is, that its intrinsic value bears a just proportion to its extrinsic or numery value.

It is true, in a pressing necessity, the state may order the citizens to receive money at a price superior to its real value; but as foreigners will not receive it at that price, the nation gains nothing by this proceeding: it is only daubing over the wound for a moment, without healing it. This excess of value, added in an arbitrary manner to the money, is a real debt which the sovereign contracts with particular persons; and in strict justice, this crisis of affairs being over, that money ought to be called in at the expence of the state, and paid for in other specie, made according to the current standard; otherwise this kind of burthen, laid only by necessity, would fall solely on those who received this arbitrary money in payment: which would be unjust. Besides, experience has shewn that such a resource is destructive to trade; for by destroying the confidence that ought to subsist between foreigners and the citizens, it raises in the same proportion the price of every thing bought of them, and engages every one to lock up or send abroad the good old specie; whereby a stop is put for a time to the circulation of money. So that it is the duty of every nation and of every sovereign to abstain, as much as possible, from so dangerous a practice, and rather to have recourse to extraordinary taxes and contributions to support the pressing exigencies of the state.

§ 107.
His rights
in this re-
spect.

Since the state is surety for the goodness of the money and its currency, the public authority alone has the right of coining it. Those who counterfeit it, violate the rights of the sovereign, whether they make it of the same standard and value or not. These are called coiners, and their crime is justly considered as one of the greatest. For if they coin base money, they rob both the public and the prince; and if they coin good, they usurp the prerogative of the sovereign. They cannot afford to make good, without there be a profit allowed for making it, and then they rob the state of the profit to which it only belongs. In both cases, they do an injury to the sovereign; for the public credit being surety for the money, the sovereign alone has a right to order it being coined. Thus the right of coining is placed among the *prerogatives of majesty*, and Bodinus * relates, that Sigismund Augustus, king of Poland, having granted this privilege to the duke of Prussia, in the year 1543, the states of the country caused a decree to be passed in which it was asserted, that the king could not grant that privilege, it being inseparable from the crown. The same author observes, that long before that time, many lords and bishops of France had the privilege of coining money, and were always considered as doing it by the king's authority; but the kings of France at last withdrew all these privileges, on account of their being often abused.

* In his Republic, Book I. Chap. X.

From the principles just laid down, it is easy to conclude, that if one nation counterfeits the money of another, or if it allows and protects the coiners who presume to do it, it does that nation an injury. But commonly the criminals of this class find no protection from any; all princes being equally interested in exterminating them.

§ 108.
The injury one nation might do another with respect to money.

There is another custom more modern, and of no less use to commerce than the establishment of money; namely *exchange*, or the business of the bankers, by means of whom a merchant remits immense sums from one end of the world to the other, with very little expence, and, if he pleases, without danger. For the same reason, that sovereigns are obliged to protect commerce, they are obliged to protect this custom, by good laws, in which every merchant, foreigner, or citizen, may find security. In that, it is equally the interest and the duty of every nation to establish among themselves wise and equitable laws of commerce.

§ 109.
Of exchange, and the laws of commerce.

C H A P. XI.

The second Object of a good Government, is to procure the true Felicity of the Nation.

LET us continue to lay open the principal objects of a good government. What we have said in the five preceding chapters, relates to the care of providing for the necessities of the people, and procuring plenty in the state: this is a point of necessity; but it is not sufficient for the happiness of a nation. Experience shews, that a people may be unhappy in the midst of all earthly enjoyments, and in the possession of the greatest riches. Whatever may contribute to make men enjoy a true and solid felicity, is a second object that deserves the most serious attention of the government. Happiness is the centre to which all the duties of a man and a people tend; and this is the great end of the law of nature. The desire of happiness is the powerful spring that puts all men in motion: felicity is the end they all have in view, and it ought to be the grand object of the public desire (Prelim. § 5.) It is then those who form this public desire, or those who represent them, and are the conductors of the nation, who are to labour after its felicity, to watch continually over it, and to advance it to the utmost of their power.

§ 110.
A nation ought to labour after its own felicity.

To succeed in this, it is necessary to instruct the people to seek felicity where it is to be found, and to teach them the means of obtaining it. The sovereign cannot then take too much pains, in instructing and enlightening his people, and in forming them to useful knowledge and wise discipline. Let them leave a hatred of the sciences to the despotic tyrants of the East: they are afraid of having their people instructed, because they would rule over slaves. But though they are obeyed with the most abject submission, they frequently experience the effects of disobedience

§ 111.
Instructions.

and

and a revolt. A just and wise prince feels no apprehensions from the light of knowledge, and knows that it is always of advantage to a good government. As men of learning are convinced that liberty is the natural inheritance of mankind, so they are more fully sensible than others, how necessary, and of what advantage it is, that this liberty should be subject to a lawful authority: incapable of being slaves, they are faithful subjects.

§ 112.
Education
of youth.

The first impressions made on the mind are of the utmost importance during the whole life. In the tender years of infancy and youth we easily receive the seeds of good and evil. Hence the education of youth is one of the most important affairs that deserves the attention of the government. It ought not to be entirely left to fathers; for the most certain way of forming good citizens, is to found useful establishments for public education, to provide able masters, to give them wise directions, and to take such mild and prudent measures, that the citizens will not neglect to take advantage of them. How admirable was the education of the Romans, in the flourishing ages of that republic, and how admirably was it calculated to form great men! The young men put themselves under the patronage of some illustrious person; they waited upon him in his house, accompanied him wherever he went, and equally improved by his instructions and example: their very sports and amusements were exercises proper to form soldiers. We see the same at Sparta, and this was one of the wise institutions of the incomparable Lycurgus. That legislator and philosopher entered into the particulars of the good education of youth*, being persuaded that, on that depended the prosperity and glory of his republic.

§ 113.
Of the arts
and sci-
ences.

Who can doubt that a sovereign, and even a whole nation, ought to encourage the arts and sciences? Without mentioning the many useful inventions that strike the eye of every one, literature and the polite arts enlighten the mind, and soften the manners. If study does not always inspire the love of virtue, it is because it sometimes, and even too often, unhappily meets with a very bad and vicious heart. The nation and its conductors ought then to protect men of learning and great artists; and to encourage them to improve their talents by honours and rewards. Let the friends of barbarism declaim against the sciences and polite arts; without stooping to answer their vain reasonings, let us content ourselves with appealing to experience. Let us compare England, France, Holland, and several towns of Switzerland and Germany, to the many regions given up to ignorance, and see if we can there find more honest men and good citizens. It would be a gross error to oppose against us the example of Sparta, and that of ancient Rome. They, it is true, neglected curious speculations, literature, and the arts of mere luxury: but the solid sciences and customs, morality, civil law,

* See *Xenophon, Lacedemon. Republica.*

politics and war, were there cultivated, especially at Rome, with more care than among us.

People, at present, generally enough acknowledge the use of literature and the polite arts, and the necessity of encouraging them. The immortal Peter I. thought that without their assistance he could not entirely civilise Russia, and render it flourishing. In England, learning and abilities lead to honour and riches. Newton was honoured, protected, and rewarded while living, and after his death his tomb was placed among those of kings. France also in this respect, deserves particular praises, and owes to the munificence of its kings, several establishments that are no less useful than glorious: the Royal Academy of Sciences diffuses on every side the light of knowledge, and the desire of instruction. Louis XV. furnished the means of sending to search, under the equator, and the polar circle, for a proof of an important truth; and we *know* now what was before *believed*, on the faith of Newton's calculations. Happy would that kingdom be, if the too general taste of the age did not make the people neglect solid knowledge, to give themselves up to that which is merely amusing, and if those who fear the light, did not succeed in darkening the blaze of science!

I speak of the liberty of publishing philosophical works; which is the soul of the republic of letters. What can genius produce when cramped by fear? Can the greatest man that ever lived enlighten many of his fellow-citizens, if he sees himself always exposed as a butt to ignorant and bigoted wranglers; if he is obliged to be continually on his guard, to avoid being accused by those who draw consequences of indirectly attacking the received opinions? I know that this liberty has its just bounds; that a wise government ought to have an eye to the press, and not suffer such works to be published as are scandalous, contrary to morality, the form of government, and the established religion. But yet great care should be taken not to extinguish a light that may afford the state the richest advantages. Few men know how to keep a just medium, and the office of literary censor ought to be trusted to none but those who are equally wise and learned. Why should they search in a book for that which it appears the author had no design of placing there; and when a writer is wholly employed about, and only speaks of philosophy, ought a malicious adversary to be listened to, who would set him at variance with religion? So far from disturbing a philosopher on account of his opinions, the magistrate ought to chastise those who publicly charge him with impiety, when in his writings he shews respect to the religion of the state. The Romans seem to have been formed to give examples to the universe: that wise people carefully maintained the worship and religious ceremonies established by law, and left the field open to the speculations of the philosophers. Cicero, a senator, consul and augur, ridicules superstition, attacks it, and demolishes it in his writings; and in this he endeavoured to promote his own happiness

§ 114.
Of the liberty of philosophizing.

piness and that of his fellow citizens: but he observes "that to destroy superstition is not to abolish religion; for a wise man, says he, will respect the institutions and religious ceremonies of his ancestors. The beauty of the world, and the admirable order of the stars are sufficient to make us acknowledge the existence of an eternal and all-perfect being, who merits the veneration of the human race *." And in his Dialogues on the Nature of the Gods, he introduces Cotta the academic, who was high-priest, attacking with great freedom the opinions of the stoics, declaring that he should always be ready to defend the established religion from which he found the republic had received great advantages; that neither the learned nor the ignorant should make him abandon it: he then says to his adversary, "These are my thoughts both as pontiff, and as Cotta. But do thou, as a philosopher, bring me to thy sentiments by the strength of thy reasons. For a philosopher ought to prove to me the truth of the religion he would have me embrace, while I ought in this respect to believe my ancestors, even without proof †."

Let us add experience to these examples and authorities. Never did a philosopher occasion disturbances in the state, or in religion by his opinions: they make no noise among the people, and never offend the weak, unless malice or intemperate zeal forces them to discover the pretended venom. He troubles the state, and puts religion in danger, who endeavours to place the opinions of a great man, in opposition to the doctrines and worship established by law.

§ 115.
They ought
to inspire
the love of
virtue, and
the abhor-
rence of
vice.

It is not enough to instruct the nation; it is still more necessary, in order to conduct it to happiness, to inspire the love of virtue, and the abhorrence of vice. Those who have searched deeply into morality, are convinced that virtue is the only path that leads to true felicity; so that its maxims contain nothing less than the art of living happily; and he must be very ignorant of politics, who does not know, that a virtuous nation will be more capable than any other of forming a state that is at once happy, tranquil, flourishing, solid, respected by its neighbours, and formidable to its enemies. The interest of the prince must

* Nam, ut verè loquamur, superstitio fusa per gentes, oppressit omnium fere animos, atque omnium imbecillitatem occupavit—multum enim & nobismet ipsis, & nostris profuturi videbamur, si eam sanctius sustulissimus. Nec vero (id enim diligenter intelligi volo) superstitione tollendâ religio tollitur. Nam & majorum instituta tueri sacris, caeremoniisque retinendis, sapientis est: & esse præstantem aliquam æternamque naturam, & eam suspiciendam, admirandamque hominum generi, pulchritudo mundi, ordoque celsitum cogit consistere. *De Divinatione, Lib. II.*

† Harum ego religionum nullam unquam contemnendam putavi: mihi que ipsa persuasi, Romulum auspiciis, Numam sacris constitutis fundamenta jecisse nostræ civitatis: que nunquam profecto sine summa placatione Deorum immortalium tanta esse potuisset. Habes, Balbe, quid Cotta, quid pontifex sentiat. Fac nunc ergo intelligam, quid tu sentias: à te enim philosopho rationem accipere debeo religionis; majoribus autem nostris, etiam nulli ratione reddita, credere. *De Natura Deorum, Lib. III.*

then concur with his duty, and the dictates of his conscience, to engage him to watch attentively over an affair of such importance. Let him employ all his authority in order to encourage virtue, and suppress vice; let him for this purpose form public establishments; and to the same end direct his own conduct, his example, and the distribution of favours, posts, and dignities. Let him carry his attention even to the private life of the citizens, and banish from the state what is proper only to corrupt the manners of the people. It is the business of politics to teach him all the means he ought to use in obtaining this desirable end; to shew him those he should prefer, and those he ought to avoid, on account of the dangers that might attend the execution, and the abuses that might be made of them. We shall here only observe, in general, that vice may be suppressed by chastisements, but that mild and gentle methods can only raise men to the dignity of virtue: it may be inspired, but it cannot be commanded.

It is an incontestible truth, that the virtues of the citizens constitute the most happy dispositions that can be desired by a just and wise government. This then affords a certain index, from which the nation may judge of the intentions of those who govern. If they endeavour to render the great and the common people virtuous, their views are pure and upright; and it is certain, that their sight is fixed alone on the great end of government, the happiness and glory of the nation. But if they spread a corruption of manners, a love of luxury, effeminacy, the rage of licentious passions, and excite the great to engage in ruinous expences, the people ought to take care of these corruptors; for they endeavour to purchase slaves, in order to rule over them in an arbitrary manner.

While a prince has just and moderate desires, he has not recourse to these odious methods. Satisfied with his superior station and the power given him by the laws, he proposes to reign with glory and safety; he loves his people, and desires to render them happy. But his ministers too commonly cannot bear to be resisted; the least opposition, if he abandons his authority to them, renders them proud and more incapable of being moved than their master; they have not the same love for his people as himself. How corrupt is human nature: they distrust the courage and firmness inspired by virtue, and know that the distributor of favours rules as he pleases over the men whose hearts are open to covetousness. So a miserable wretch who exercises the most infamous of all professions, perverts the inclinations of a young victim to her odious traffic; she prompts her to luxury and gluttony, she fills her with softness and vanity, to deliver her up more surely to a rich seducer. This base and unworthy creature is sometimes chastised by the magistrate; but the minister, who is infinitely more guilty, swims in opulence, and is invested with honour and authority. Posterity, however, will do him justice, and detest the corrupter of a respectable nation.

§ 116.

The nation
may from
this discover
the inten-
tion of those
who go-
vern.

§ 117.
The state,
or the pub-
lic person,
ought to
perfect its
under-
standing
and will.

If the governors endeavoured to fulfil the obligations which the law of nature lays upon them with respect to themselves, and in their character of conductors of the state, they would be incapable of ever giving into the odious abuse just mentioned. Hitherto we have considered the obligation a nation is under to acquire knowledge and virtue, or to perfect its understanding and will; we have, I say, considered this obligation relatively to the particulars that compose a nation: it also belongs in a proper and singular manner to the conductors of the state. A nation while it acts in common, or in a body, is a moral person (Prelim. § 2.) that has its understanding and will, and is not less obliged than each individual to obey the laws of nature (Prelim. § 5.) and to improve its faculties (Book I. §. 21. This moral person resides in those who are invested with the public authority, and represent the entire nation. Whether this be the common council of the nation, an aristocratic body, or a monarchy, this sovereign, whatever he be, is then indispensibly obliged to procure all the lights, and all the knowledge necessary to govern well, and to form in himself the practice of all the virtues suitable to a sovereign.

And as this obligation is imposed with a view to the public welfare, he ought to direct all his knowledge, and all his virtues, to the safety of the state, the end of civil society.

§ 118.
And to di-
rect the
knowledge
and virtues
of the citi-
zens to the
welfare of
the society.

He ought even to direct, as much as possible, all the abilities, the knowledge, and the virtues of the citizens to this great end; in such a manner, that they may not only be useful to the individuals who possess them, but also to the state. This is one of the great secrets in the art of reigning. The state will be powerful and happy if the good qualities of the subject, passing beyond the narrow sphere of the virtues of individuals, become the virtues of citizens. This happy disposition raised the Roman republic to the highest pitch of power and glory.

§ 119.
The love of
the country.

The grand secret of giving the virtues of the individuals to happy a turn, with respect to the state, is to inspire the citizens with an ardent love for their country. It will then naturally follow, that each will endeavour to serve the state, and to apply all his powers and abilities to the advantage and glory of the nation. This love of our country is natural to all men. The good and wise author of nature has taken care to bind them, by a kind of instinct, to the places where they received their first breath, and they love their own nation, as a thing with which they are intimately connected. But frequently some causes unhappily weaken or destroy this natural impression. The injustice or the severity of the government too easily effaces it in the hearts of the subjects: does self-love attach a single person to his country, where every thing seems to be made for one man? Far from it, we see that only free nations are fond of glory and the happiness of their country. Let us call to mind the citizens of Rome in the happy days of the republic, and consider now the English and Swifs.

The

The love and affection a man feels for the state of which he is a member, is a necessary consequence, of the wise and rational love he owes to himself; since his own happiness is connected with that of his country. This sensation ought also to flow from the engagements he has entered into with society. He has promised to procure its safety and advantage as much as is in his power: and how can he serve it with zeal, fidelity, and courage, if he has not a real love for it? § 120.
In particular persons,

The nation in a body, ought doubtless to love itself, and desire its own happiness as a nation. The sensation is too natural to dispense with this obligation: but this duty relates more particularly to the conductor, the sovereign, who represents the nation, and acts in its name. He ought to love it, as what is most dear to him, to prefer it to every thing, for it is the only lawful object of his care, and of his actions, in every thing he does by virtue of the public authority. The monster who does not love his people, can be only an odious usurper; he doubtless, deserves to be cast from the throne. There is no kingdom where the statue of Codrus ought not to be placed before the palace of the sovereign. That magnanimous king of Athens gave his life for his people. His country being attacked by the Heraclides, he consulted the oracle of Apollo; and being answered, that the people whose chief should be slain, would remain victorious, Codrus disguised himself, and rushing into the battle was killed by one of the enemies' soldiers. Henry IV. king of France, joyfully exposed his life for the safety of his people. That great prince and Louis XII. are illustrious models of the tender love a sovereign owes to his subjects. § 121.
In the nation or state itself, and in the sovereign,

The term *country*, seems to be very well understood by every body. However, as it is taken in different senses, it may not be unuseful to give it here an exact definition. It commonly signifies the state of which one is a member; and in this sense we have used it in the preceding paragraphs, and it ought to be thus understood in the law of nations. § 122.
Definition of the term country.

In a more confined sense, and more agreeably to its etymology, this term signifies the state, or even more particularly the town or place, where our parents lived at the moment of our birth. In this sense, it is justly said, that our country cannot be changed, and always remains the same, to whatsoever place we remove afterwards. A man ought to preserve gratitude and affection for the place where he received his education, and of which his parents were members when they gave him life. But as several lawful reasons may oblige him to chuse another country, that is to become a member of another society; so when we speak in general of the duty to our country, we ought to understand by this term, the state of which a man is an actual member; since it is that to which he owes it entirely, and in preference to all others.

E

If

§ 123.
How
shameful
and criminal it is to
injure our
country.

If every man is obliged to entertain a sincere love for his country, and to procure it all the happiness in his power, it is a shameful and detestable crime to injure that very country. He who becomes guilty of it, violates his most sacred engagements, and sinks into base ingratitude: he dishonours himself by the blackest perfidy, since he abuses the confidence of his fellow-citizens, and treats as enemies those who had a right to expect his assistance and services. We see traitors to their country only among those men who are solely sensible of a base interest, who have an immediate value for none but themselves, and whose heart is incapable of every sentiment of affection for others. They are therefore justly detested by the whole world, as the most infamous of all villains.

§ 124.
The glory
of good ci-
tizens: ex-
amples.

On the contrary, those generous citizens are treated with honour and commendations, who, not barely contented with performing what they in general owe to their country, make noble efforts in its favour, and are capable of making it the greatest sacrifices. The names of Brutus, Curtius, and the two Decii, will live as long as that of Rome. The Swifs will never forget Arnold de Winkelreid, that hero whose action deserves to be transmitted to posterity by a Titus Livy. He truly devoted himself to his country; he did it as a captain and a soldier, and not as a superstitious visionary. That gentleman, who was of the country of Underwald, seeing at the battle of Sempach that his fellow-countrymen could not break through the Austrians, because, being armed from head to foot, they had dismounted, and forming a close battalion, presented a front covered with iron, and bristling with pikes and lances; formed the generous design of sacrificing himself for his country. "My friends, said he to the Swifs, who began to be dispirited, I am going this day to give my life to procure you the victory: I only recommend to you my family: follow me, and act in consequence of what you see me do." At these words he ranged them in that form which the Romans called *cuneus*, and forming himself the point of the triangle, marched to the centre of the enemy, and snatching all the pikes he could seize, threw them on the ground; thus opening for those who followed him a way to penetrate into the midst of this thick battalion. The Austrians once broke, were conquered, the weight of their armour became fatal to them, and the Swifs obtained a complete victory*.

* In the year 1386, the Austrian army consisted of four thousand choice men, among whom were a great number of princes, counts and nobility of distinguished rank, all armed from head to foot. The Swifs were no more than thirteen hundred men, ill-armed. In this battle, the duke of Austria perished with two thousand of his forces, in which number were six hundred and seventy-six gentlemen of the best families in Germany. *History of the Helvetic Confederacy, by de Watteville, Vol. I. p. 183, and following.*

CHAP. XII.

Of Piety and Religion.

PIETY and religion have an essential influence on the happiness of a nation, and from their importance, deserve a particular chapter. Nothing is so proper as piety to strengthen virtue, and give it its full extent. I understand by the word *piety*, a disposition of soul that leads us to have a view of the divine Being in all our actions, and to endeavour in every thing we do to please him. This virtue is an indispensable obligation on all mankind; it is the purest source of their felicity; and those who unite in civil society, are still more obliged to practise it. A nation ought then to be pious. The superiors intrusted with the public affairs should constantly propose to deserve the approbation of their divine master, and whatever they do in the name of the state, ought to be regulated by this grand view. The care of forming pious dispositions in all the people, should be constantly one of the principal objects of their vigilance, and from this the state will receive very great advantages. A serious attention to obtain in all our actions the approbation of an infinitely wise Being, cannot fail of producing excellent citizens; for rational piety in the people is the firmest support of a lawful authority; and in the sovereign's heart, it is the pledge of the people's safety, and produces their confidence. Ye masters of the earth, who acknowledge no superior here below, what assurance can your subjects have of your intentions, if they do not see you filled with respect for the common Father and Lord of men, and animated with a desire to please him?

§ 125.
Of piety.

We have already insinuated that piety ought to be attended with knowledge. In vain would we propose to please God, if we know not the means of doing it. What a deluge of evils arises when men heated by so powerful a motive, are prompted to take methods that are equally false and pernicious! A blind piety forms none but superstitious persons, fanatics and persecutors, a thousand times more dangerous to society than the libertines. There have appeared barbarous tyrants who have talked of nothing but the glory of God, while they crushed the people, and trampled the most sacred laws of nature under foot. From a refinement of piety, the anabaptists of the sixteenth century refused all obedience to the powers of the earth. James Clement and Ravallac, those execrable parricides, thought themselves animated by the most sublime devotion.

§ 126.
It ought to be attended with knowledge.

Religion consists in the doctrines of divinity, and the things of another life, and in the worship appointed to the honour of the supreme Being. As it is seated in the heart, it is an affair of conscience, in which every one ought to be directed by his own understanding: but as it is external, and publicly established, it is an affair of the state.

§ 127.
Of religion internal and external.

§ 128.
Liberty of
conscience,
the right of
individuals.

Every man is obliged to endeavour to obtain just ideas of God, to know his laws, his views with respect to his creatures, and the end for which they were created : man, doubtless, owes the most pure love, the most profound respect to his Creator ; and to keep alive these dispositions, and act in consequence of them, he should honour God in all his actions, and shew, by the most suitable measures, the sentiments that fill his mind. This short explanation is sufficient to prove, that man is essentially and necessarily free to make use of his own choice in matters of religion. His belief is not to be commanded ; and what kind of worship must that be, which is produced by force ! worship consists in certain actions performed with an immediate view to the honour of God ; there can then be no worship proper for any man, which he does not believe suitable to that end. The obligation of sincerely endeavouring to know God, of serving him, and adoring him from the bottom of the heart, being imposed on man by his very nature, it is impossible for him by his engagements with society, to discharge this duty, or to deprive himself of the liberty necessary to fulfil it. It must then be concluded, that liberty of conscience is a natural and inviolable right. It is a disgrace to human nature, that a truth of this nature should want to be proved.

§ 129.
The duties
and rights of
the nation
in regard to
the public
establish-
ment of re-
ligion.

But we should take care not to extend this liberty beyond its just bounds. A citizen has only the right of never being obliged to do any thing in religious affairs, and not that of doing outwardly whatever he pleases, though it may proceed from his regard to society. The establishment of religion by the laws, and its public exercise, are matters of state, and are necessarily under the jurisdiction of the public authority. If all men ought to serve God, the entire nation, in its national capacity, is doubtless obliged to serve and honour him (Prelim. § 5.) And as it ought to discharge this important duty in that manner which appears to the nation to be the best ; the nation is to determine the religion it would follow, and the public worship it would establish.

§ 130.
When there
is no esta-
blished re-
ligion.

If there be yet no religion established by public authority, the nation ought to use the utmost care, in order to know and establish the best. That which shall have the approbation of the majority shall be received, and publicly established by law ; by which means it will become the religion of the state. But it is asked, if a considerable part of the nation insists upon following another, what does the law of nations require in that respect ? Let us first remember that liberty of conscience is a natural right ; and that there must be no constraint in this respect. There remains then two methods to take ; either to permit this party of the citizens to exercise the religion they profess, or to separate the society, by leaving them their fortunes and their share of the country that belonged to the nation in common, and thus form two new states instead of one. The last method will appear no ways proper ; it would weaken the nation, and thus would be
contrary

contrary to the regard that ought to be felt for its safety. It is therefore of more advantage to take the first, and thus to establish two religions in the state. But if these religions are too incompatible; if there be reason to fear that they will produce disturbances among the citizens, and disorder in affairs; there is a third method, a wise medium between the two first, of which the Swiss have furnished examples. The cantons of Glaris and Appenzel were, in the sixteenth century, each divided into two parts, the one preserved the Romish religion, and the other embraced the reformation: each party has its separate government within itself; but they unite in foreign affairs, and form only one and the same republic, one canton.

In short, if the number of citizens who would profess a different religion from that established by the nation be inconsiderable, and if for good and just reasons it is not thought proper to allow the exercise of several religions in the state; these citizens have a right to sell their lands, and retire with their families; taking all their substance with them. For their engagements to society, and their submission to the public authority can never oblige them to violate their consciences. If the society will not allow me to do what I think I am obliged to perform by an indispensable obligation, it ought to dismiss me.

When the choice of a religion is already made, and one is established by law, the nation ought to protect and maintain that religion, and preserve it as an establishment of the greatest importance; but always without blindly rejecting the changes that may be proposed to render it more pure and useful: for the state ought always to attend to its perfection (§ 21.) But as all innovations in this case, are full of danger, and can seldom be produced without disorder, they ought not to be attempted upon slight grounds, without necessity, or very important reasons. The society, the state, the entire nation, is only to determine the necessity or convenience of these changes, and it does not belong to any single person to attempt them by his own authority, nor consequently to preach a new doctrine. Let him offer his sentiments to the conductors of the nation, and submit to the orders he receives from them.

But if a new religion spreads, and becomes fixed in the minds of the people, as it commonly happens, independently of the public authority, and without any deliberation in common; it will be then necessary to reason as we have just done in a former section, on the case of choosing a religion; to pay attention to the number of those who follow the new opinions; to remember that no earthly power has authority over the conscience, and to unite the maxims of sound politics with those of justice and equity.

This is an abridgement of the duties and rights of a nation with regard to religion. Let us now come to those of the sovereign. These cannot be exactly the same as those of the nation which the sovereign represents. The nature of the subject opposes it; for

§ 131.
When it is
established
by law.

§ 132.
The duties
and rights
of a sove-
reign with
regard to
in religion.

in religion nobody can give up their liberty. To exhibit in a clear manner these duties and rights, it is necessary here to refer to the distinction we have made in the two preceding sections: if it be required to establish a religion in a state that has not yet received one, the sovereign may doubtless favour that which appears true, or the best to him, to make it known, and endeavour, by the most mild and prudent measures, to establish it: he is even obliged to do this, because he is obliged to study every thing that concerns the happiness of the nation. But in this he has no right to use authority and constraint. Since there was no religion established in the society, when he received his authority, the people could confer no power on him in this respect; the maintenance of the laws relating to religion were no part of his office, and did not belong to the authority with which they intrusted him. Numa was the founder of the religion of the ancient Romans: but he persuaded the people to receive it. If he had been able to command, he would not have had recourse to the reveries of the nymph Egeria. Though the sovereign cannot make use of authority in order to establish a religion where there is none, he has a right, and is even obliged to employ all his power to hinder the introduction of a bad one, which he judges pernicious to morality and dangerous to the state. For he ought to preserve his people from every thing that may be injurious to them; and a new doctrine is so far from being an exception to this rule, that it is one of the most important objects. We are going to see in the following paragraphs, what are the duties and prerogatives of the prince in regard to the religion publicly established.

§ 133.
In the case
whether there
is a religion
established
by law.

The prince, or the conductor, to whom the nation has intrusted the care of the government, and the exercise of the sovereign power, is obliged to watch over the preservation of the received religion, the worship established by law, and has a right to restrain those who attempt to destroy, or disturb it. But to acquit himself of this duty in a manner equally just and wise, he ought never to lose sight of the equality in which he is called to act, and the reason of his being invested with it. Religion is of extreme importance to the welfare and tranquility of the society, and the prince is obliged to have an eye to every thing in which the state is interested. This is all that calls him to interfere in religion, or to protect and defend it. He can then interfere only upon this footing, and consequently he can use his power against none but those whose religious conduct, is prejudicial or dangerous to the state, and cannot punish pretended crimes against God, where the vengeance alone belongs to the Sovereign Judge, the Searcher of hearts. Let us remember that religion is no farther an affair of state, than as it is exterior and publicly established: that of the heart can only depend on the conscience. The prince has a right to punish none but those that disturb society, and it would be very unjust for him to inflict pains and penalties on any person whatsoever for his private opinions, when that person

neither take pains to divulge them, nor to obtain followers. It is a principle of fanaticism, a source of evils, and the most notorious injustice for weak mortals to imagine that they ought to take up the cause of God, maintain his glory by acts of violence, and revenge him on his enemies. *Let us only give to sovereigns,* said a great statesman and an excellent citizen * let us give them *for the common advantage, the power for punishing whatever is injurious to charity in society. It does not belong to human justice to become the revenger of the cause that belongs to God.* Cicero, who was as able, and as great in state affairs, as in philosophy and eloquence, thought like the duke of Sully. In the laws he proposed relating to religion, he says, on the subject of piety and interior religion, "if any one commits a fault, God will revenge it:" but he declares the crime capital that should be committed against the religious ceremonies established for the public affairs, and in which the whole state is concerned †. The wise Romans were very far from persecuting a man for his creed; they only required that people should not disturb the public order.

The creed, or the opinions of the people, their sentiments with respect to the Deity, in a word, interior religion should, like piety, be the object of the prince's attention; he should neglect no means of enabling his subjects to discover the truth, and to entertain good sentiments; but he should employ for this purpose only mild and paternal methods ‡. Here he cannot command (§ 128.) It is in external religion and its public exercise that his authority is to be employed. His task is to preserve it, to prevent the disorders and troubles it may occasion. To preserve religion he ought to maintain it in the purity of its institution, to take care that it be faithfully observed in all its public acts and ceremonies, and to punish those who dare attack it openly. But he can require nothing by force except silence, and ought never to oblige a person to bear a part in external ceremonies: he can only by constraint produce uneasiness or hypocrisy.

A diversity of opinions and worship has often produced disorders and fatal dissensions in a state: and for this reason, many will suffer only one and the same religion. A prudent and equitable sovereign will see in particular conjunctures, if it be proper to tolerate, or forbid the exercise of several different kinds of worship.

But in general, we may boldly affirm, that the most safe and equitable means of preventing the disorders that may be occasioned by difference of religion, is an universal toleration of all the

* The duke de Sully; see his Memoirs digested by M. de l'Ecluse, *Tom. V* p. 135, 136.

† Qui secus faxit, Deus ipse vindex erit—Qui non paruerit, capitale esto. *De Legib. Lib. II.*

‡ Quas (religionis) non metu, sed ea conjunctione, quæ est homini cum deo, conservandas puto. *Cicero de Legib. Lib. I.* What a fine lesson does this pagan philosopher give the Christians!

religions that have nothing dangerous in them, either with respect to manners, or the state. Let us suffer the interested priests to declaim; they would not trample under foot the laws of humanity, and those of God himself, to make their doctrines triumph, if they were not the foundations on which are erected their opulence, luxury, and power. Crush only the spirit of persecution, punish severely whoever shall dare to disturb others on account of their creed, and you will see all these sects live in peace in their common country, and be ambitious of shewing themselves good citizens. Holland and the states of the king of Prussia furnish a proof of this: Calvinists, Lutherans, Socinians, Jews, Catholics, Pietists, all live in peace, because they are equally protected by the sovereign; and none are punished, but the disturbers of the tranquility of others.

§ 136.
What the
prince
ought to do
when the
nation is re-
solved to
change the
religion.

If in spite of the prince's care to preserve the established religion, the entire nation, or the greater part of it, should be disgusted with it, and desire to have it changed: the sovereign cannot do violence to his people, nor restrain them in an affair of this nature. The public religion was established for the safety and advantage of the nation; but it is without efficacy, when it ceases to influence the heart: the sovereign has here no other authority besides that which results from the trust the nation has reposed in him; and the people have committed to him that of protecting their religion while they thought proper to profess it.

§ 137.
The differ-
ence of re-
ligion
ought not
to make a
prince lose
his crown.

But at the same time it is very just that the prince should have the liberty of continuing in the profession of his own religion, without losing his crown. Provided that he protects the religion of the state, this is all that can be required of him. In general, a difference of religion should never make any prince lose the prerogatives of sovereignty, unless a fundamental law disposes it otherwise. The pagan Romans did not cease to obey Constantine, when he embraced Christianity; nor did the Christians revolt from Julian, after he had quitted it.

§ 138.
The agree-
ment be-
tween the
duties and
rights of the
sovereign,
with those
of the sub-
jects.

We have established liberty of conscience for the people (§ 128.) However, we have also shewn that the sovereign has a right, and is even under an obligation to protect and maintain the religion of the state, and not to suffer any person to attempt to alter or destroy it; that he may even, according to circumstances, permit only one kind of public worship throughout the whole country. Let us reconcile these duties and various rights; between which it may be thought that there is some contradiction; and if possible leave nothing to be desired on so important and delicate a subject.

If the sovereign will allow only the public exercise of the same religion; let him oblige no body to do any thing contrary to his conscience; let no subject be forced to bear a part in a worship which he disapproves, or profess a religion which he believes to be false; but let the subject on his side satisfy himself with his not having fallen into a shameful hypocrisy; let him serve God according to the light of his own knowledge, in secret, and in
his

his own house, persuaded that providence does not call him to public worship, since it has placed him in such circumstances, that he cannot discharge it without creating disturbances in the state. God would have us obey our sovereign, and avoid every thing that may be pernicious to society. These are the immutable precepts of the law of nature: that of public worship is conditional, and dependent on the effects it may produce. Interior worship is necessary in its own nature; and we ought to confine ourselves to it, in all cases in which it is most convenient. Public worship is appointed for the edification of men in glorifying God: but it opposes that end, and ceases to be laudable, on such occasions when it can only produce disturbances, and give offence. If any one believes it absolutely necessary, let him leave the country where he is not allowed to perform it according to the dictates of his own conscience, and join those who openly profess the same religion as himself.

The prodigious influence of religion on the welfare and tranquility of the society invincibly, prove, that the conductor of the state ought to have the inspection of what relates to it, and an authority over the ministers who teach it. The end of society and of the civil government necessarily requires, that he who has the authority, should be invested with all the rights without which he could not exercise it in a manner most advantageous to the state. These are the prerogatives of majesty (§ 45.) of which no sovereign can divest himself, without the express consent of the nation. The inspection of the affairs of religion, and the authority over its ministers, then form one of the most important of his prerogatives, since without this power the sovereign would never be able to prevent the disturbances that religion might occasion in the state, nor apply that powerful spring to the welfare and safety of the society. It would be certainly very strange that a multitude of men who united themselves in society for their common advantage, that each might in tranquillity labour to supply his necessities, promote his own perfection and happiness, and live like a reasonable being; it would be very strange, I say, that such a society should not have the right of being guided by its own judgment, in an affair of the utmost importance; of determining what is believed most agreeable to religion, and of taking care that nothing dangerous or hurtful is mixed with it. Who will dare to dispute that an independent nation has a right, in this respect, to proceed, like others, according to the light of conscience? and when it has once made choice of a particular religion and worship, may it not confer on its conductor the whole power of which it is possessed of regulating, directing, and causing this religion and worship to be observed?

Let it not be said, that sacred things do not belong to the profane. Such discourses when brought to the bar of reason, are found to be only vain declamations. There is nothing on earth more august and sacred than a sovereign; and why should God, who calls him by his providence to attend on the safety and happiness

§ 139.
The sovereign ought to have the inspection of the affairs of religion, and authority over those who teach it.

pineness of a whole nation, deprive him of the direction of the most powerful spring that can move mankind? The law of nature secures to him this right, with all those that are essential to good government; and nothing is to be found in the Holy Scriptures that changes this disposition. Among the Jews, neither the king nor any other person could make any innovation in the law of Moses; but the sovereign attended to its preservation, and knew how to humble the high-priest, when he deviated from his duty. Where is it asserted in the New Testament, that a Christian prince has nothing to do with religious affairs? Submission and obedience to the superior powers, are there clearly and expressly enjoined. In vain, would they oppose against us the example of the apostles, who preached the gospel in opposition to the will of sovereigns: whoever would deviate from the ordinary rules, ought to have a divine mission, and to establish his authority by miracles.

No person can dispute that the sovereign has a right to take care that the people do not intrude into religion any thing contrary to the welfare and safety of the state; and consequently, he must have a right to examine its doctrines, and to point out what ought to be taught, and where the preacher should be silent.

§ 130.
He ought to prevent the abuse of the received religion.

The sovereign ought likewise to watch attentively, in order to prevent the established religion from being abused, either by making use of its discipline to gratify hatred, avarice, or any other unworthy passions, or presenting its doctrines in a light that must prove prejudicial to the state. What advantage can society reap from crude imaginations, seraphic devotions, and sublime speculations, when it consists of only weak and docile minds? These can only produce a renunciation of the world, a neglect of business and of honest labour. This society of pretended saints will become an easy and certain prey to the first ambitious neighbour; or if it is left in peace, it will not survive the first generation; the two sexes consecrating their chastity to God, will refuse to yield to the views of the Creator, of nature, and of the state. Unhappily for the missionaries, it evidently appears, even from the history of New France, by Charlevoix, that their labours were the principal cause of the ruin of the Hurons. The author expressly says, that a great number of these *Neophytes*, would think of nothing but of the subjects of their faith, that they forgot their activity and valour, and divisions arose between them and the rest of the nation, &c. These people were therefore soon destroyed by the Iroquois, whom they had before been accustomed to conquer*.

§ 141.
The sovereign's authority over the ministers of religion.

To the prince's inspection of the affairs and offices of religion we have joined his authority over its ministers: both of them flow from the same principle. for without this last, the first would be vain and useless. It is absurd, and contrary to the first foundations of society, for citizens to pretend to be independent of the

* See *The History of New France*, Book V. VI. and VII.

sovereign authority, in offices of such importance to the repose, the happiness, and safety of the state. This is establishing two independent powers in the same society: a certain principle of division, disturbance, and ruin. There is only one supreme power in the state; the offices of the subalterns vary according to their employments; the ecclesiastics, magistrates, and commanders of the troops, are all officers of the republic, each in his department; and all are equally accountable to the sovereign.

A prince cannot indeed justly oblige an ecclesiastic to preach a doctrine, or to perform a religious rite which he does not believe to be agreeable to the will of God. But if the minister cannot, in this respect, conform to the will of his sovereign, he ought to quit his place, and consider himself as a man who is not called to fill it; two things being necessary for the discharge of his duty; to teach and behave with sincerity, according to the dictates of his own conscience, and to conform to the prince's intentions, and the laws of the state. Who can forbear being filled with indignation, at seeing a bishop audaciously resist the orders of the sovereign, and the decrees of the supreme tribunals, solemnly declaring that he believes himself accountable to God alone, for the power with which he has entrusted him?

On the other hand, if the clergy are humbled, it will be out of their power to produce the fruits for which their ministry was appointed. The rule that should be followed in this respect may be conceived in a few words. First, the clergy, as well as every other order, should submit in their functions, and in every thing else, to the public power, and be accountable for their conduct to the sovereign. Secondly, the prince should take care to render the ministers of religion respectable in the eyes of the people; he should trust them with the degree of authority necessary to enable them to discharge their duty with success, and support them, in case of need, with the power he holds in his own hands. Every man in place ought to be furnished with an authority answerable to his functions; otherwise he will be unable to discharge them in a proper manner. I see no reason why the clergy should be excepted from this general rule, only the prince should be more particularly watchful that they do not abuse his authority; the affair being altogether the most delicate, and the most fruitful in dangers. As he should render the character of churchmen respectable, he should take care that this respect is not carried to such a superstitious veneration, as to put it in the power of an ambitious priest, to have what influence he pleases over weak minds. As soon as the clergy are made a separate body, they become formidable. The Romans, (whom we often cite) the wise Romans received into the senate the pontifex-maximus, and the principal ministers of the altar; they were ignorant of the distinction between the *clergy* and the *laity*; and all citizens wore the same robe.

If the sovereign be deprived of his power in matters of religion, and this authority over the clergy, how will he prevent there being

§ 142.

The nature of this authority.

§ 143.

The rule to be observed with respect to ecclesiastics.

§ 144.

A recapitulation of the reasons on

which are
established
the rights of
sovereigns
in matters
of religion;
with author-
ities and
examples.

ing any thing mixed with religion that is contrary to the welfare of the state? How will he be enabled to take such measures, as to cause it to be constantly taught and practised in the manner most conducive to the public welfare? And especially, how will he prevent the disorders that may be occasioned, either by doctrines, or the manner in which the discipline is exerted. These cares and duties can only belong to a sovereign, and nothing can dispense with his discharging them.

Hence we see that the prerogatives of the crown, in ecclesiastical affairs, have been constantly and faithfully defended by the parliaments of France. The wise and learned magistrates of which those illustrious bodies are composed, are sensible of the maxims which sound reason dictates on this subject. They know the consequence of not suffering any abridgment to be made of the public authority in an affair in its own nature so delicate, so extensive in its connections, and influences, and so important in its consequences. What shall ecclesiastics resolve to propose to the people as articles of faith, some obscure and useful points, that is no essential part of the received religion; shall they separate from the church, and defame those who do not shew a blind obedience; shall they refuse them the sacraments, and even the rights of burial; and shall not the prince protect his subjects, and preserve the kingdom from a dangerous schism?

The kings of England have asserted the prerogatives of their crown; they have caused themselves to be acknowledged heads of the church, and this regulation is equally approved by reason and sound politics, and is also conformable to ancient custom. The first christian emperors exercised all the functions of heads of the church; they made laws on subjects relating to it*, summoned councils, and presided at them; elected and deposed bishops, &c. In Switzerland there are wise republics, whose sovereigns, knowing the full extent of the supreme authority, have rendered the ministers of religion subject to them, without offering violence to conscience. They have prepared a formulary of the doctrines that ought to be preached, and published such laws of ecclesiastical discipline, as they would have exercised in the countries under their obedience; in order, that those who would not conform to these establishments, might not devote themselves to the service of the church. They keep all the ministers of religion under a lawful dependence; and discipline is exerted under their own authority. It is not probable, that religion will ever occasion disturbances in these republics.

§ 145.
Pernicious
consequen-
ces of the
contrary
opinion.

If Constantine and his successors had expressly declared themselves the heads of the church, and if the Christian kings and princes had, in this instance, known how to maintain the rights of overignty, would there ever have appeared those horrid disorders produced by the pride and ambition of some popes and ecclesiastics, emboldened by the weakness of princes, and supported

* See the *Theodosian Code*.

by the superstition of the people? What rivers of blood have been shed in the quarrels of monks, about speculative questions that were often unintelligible, and almost always as useless with respect to the salvation of souls, as they were indifferent in themselves, or in regard to the welfare of society: citizens and even brothers have taken up arms against each other: subjects have been excited to revolt, and kings tumbled from their thrones: *Tantum religio potuit suadere malorum!* The history of the emperors Henry IV. Frederic I. Frederic II. and Louis of Bavaria are well known. Was it not the independence of the ecclesiastics, and of that system in which the affairs or religion are submitted to a foreign power, that plunged France into the horrors of the league, and had nearly deprived her of the best and greatest of her kings? Had it not been for this strange and dangerous system, would a stranger, pope Sixtus V. have undertaken to violate the fundamental law of a kingdom, to declare the lawful heir incapable of wearing the crown? Would, at other times, and in other places*, the succession have been rendered uncertain, from the want of a formality in a dispensation, whose validity was disputed, and which a foreign prelate pretended to have a sole right to give? Would that same foreigner have arrogated to himself the power of pronouncing that the children of a king were illegitimate? Would kings have been assassinated in consequence of a detestable doctrine†? Would a part of France not dare to acknowledge the best of their kings‡, before they had been absolved by Rome? And would many other princes have been unable to give a solid peace to their people, from their being unable in their own dominions, to decide affairs that belonged to religion§?

All we have advanced on this subject, so evidently flows from the notions of independence and sovereignty, that it will never be disputed by an honest man who endeavours to reason justly. If a state cannot finally determine every thing relating to religion, the nation is not free, and the prince is but half a sovereign. There is no medium in this case; either each state is its own master in this respect, as well as in all others, or it must receive the system of Boniface VIII. and consider all popish countries as forming one only state, of which the pope is the supreme head, and the kings subordinate administrators in temporal affairs, each in his province? nearly as the sultans were formerly under the authority of the kalifs. We know that this pope presumed to write to Philip the Fair, king of France, *Scire te volumus, quod in spiritualibus & temporalibus nobis subes* ||: Know that thou art subject

§ 146.
The abuses
particu-
larised.
1. The
power of
the popes.

* In England, under Henry VIII.

† Henry III. and Henry IV. assassinated by the fanatics, who thought to serve God and the church by stabbing their king.

‡ Though Henry IV. embraced the Romish religion, a great number of Catholics did not dare to acknowledge him before he had received the pope's absolution.

§ Many kings of France in the religious wars.

|| Turretin. *Hist. Ecclesiast. Compendium*, p. 182. Where may also be seen the king of France's bold answer.

to us as well in temporals as in spirituals. And we may see in the canon law * the famous bull *unam sanctam*, in which it is attributed to the church two swords, or a double power, spiritual and temporal; and those who think otherwise, are condemned as men, who after the example of the Manicheans, establish two principles, and it is at length declared, that it is an article of faith, necessary to salvation, to believe that every human creature is subject to the pontif of Rome.

We reckon the enormous power of the popes, as the first abuse that sprung from this system, which divests sovereigns of their authority in matters of religion. This power in a foreign court, is absolutely contrary to the independence of nations and the sovereignty of princes. It is capable of overturning the state, and wherever acknowledged, it is impossible for the sovereign to govern in such a manner as is most for the advantage of the nation. We have, already, in the last section, given several remarkable instances of this, and history presents them without number. The senate of Sweden having condemned Trollius, archbishop of Upsal, for the crime of rebellion, to be degraded from his see, and to end his days in a monastery, pope Leo X. had the audacity to excommunicate the administrator Steno, and the whole senate, and sentenced them to rebuild at their own expence, a fortress belonging to the archbishop, which they had caused to be demolished, and pay a fine of a hundred thousand ducats to the deposed prelate †. The barbarous Christiern, king of Denmark, was authorised by this decree to lay Sweden waste, and to spill the blood of the most illustrious of the nobility. Paul V. thundered out an edict against Venice, on account of some very wise laws made with respect to the government of the city; but which displeased the pope, and threw the republic into an embarrassment, from which all the wisdom and firmness of the senate could scarcely deliver them. Pius V. in his bull in *Cana Domini* of the year 1567, declares, that all princes who shall introduce new taxes in their dominions, of what nature soever they be, or shall encrease the antient ones, without having first obtained the approbation of the holy see, are excommunicated *ipso facto*. Is not this attacking the independence of nations, and ruining the authority of sovereigns?

In those unhappy times, the dark ages that preceded the revival of literature and the reformation, the popes attempted to regulate the actions of princes, under the pretence of conscience, to judge of the validity of their treaties, to break their alliances, and declare them null and void. But these enterprises met with a vigorous resistance, even in a country where it is commonly imagined there was then much valour and very little knowledge. The pope's nuncio, to oblige the Swiss to forsake the French, published a monitory against all those cantons who favoured

* *Extravag. Commun. Lib. 1. Tit. De Majoritate & Obedientia.*

† *History of the Revolutions in Sweden.*

Charles VIII. declaring them excommunicated, if within the space of fifteen days they did not forsake the interest of that prince, and enter into the confederacy against him : but the Swiss opposed this act by a protestation that declared it abusive, and caused it to be pulled down in all the places under their obedience ; thus they have shewed their contempt for a proceeding that was equally absurd and contrary to the rights of sovereigns *. We shall mention several other of the like attempts, when we come to treat of the faith of treaties.

This power in the popes has given birth to another abuse, that deserves the utmost attention from a wise government. We see several countries in which ecclesiastical dignities, and great benefices are distributed by a foreign power, by the pope, who bestows them upon his creatures, and very often on men who are not the subjects of the state. This practice is equally contrary to the law of nations, and the principles of common policy. A people ought not to receive laws from strangers, to suffer them to interfere in their affairs, nor to take from them their advantages : but how many states are there where a stranger may dispose of places of very great importance with respect to their happiness and repose ? The princes who consented to the introduction of so enormous an abuse, were equally wanting to themselves and their people. In our times, the court of Spain has been obliged to expend immense sums to enter without danger into the peaceable possession of a right, that essentially belongs to the nation, or its head.

Even in the states whose sovereigns have preserved so important a prerogative of the crown, the abuse in a great measure subsists. The sovereign nominates indeed to bishoprics and great benefices ; but his authority is not sufficient to put them in the possession of their benefices, and to enable them to enter into the exercise of their functions, they must also have bulls from Rome †. By this means and by a thousand others, the whole body of the clergy still depend on the court of Rome : they expect from it dignities and the purple, which, according to the ostentatious pretensions of those who are invested with it, renders them equal to sovereigns : they have every thing to fear from its resentment, and therefore are always disposed to comply with it. On the other hand, the court of Rome supports this clergy with all its power ; it assists them by its politics and credit ; protects them against their enemies, and against those who would set bounds to their power ; frequently against the just indignation of their sovereign ; and by this means attaches them to it still more strongly. Is it not doing an injury to the rights of society, and shocking the first

§ 147.

2. Important employments conferred by a foreign power.

§ 148.

3. Powerful subjects dependent on a foreign court.

* *Vogel's Historical and Political Treatise on the Alliance between France and the thirteen Cantons*, p. 33, and 36.

† We may see in the letters of Cardinal d'Osât, what pains, what oppressions, what long delays Henry, IV. suffered, when he resolved to promote Renald de Baune, Archbishop of Bourges, to the archbishopric of Sens, though that prelate had saved France, by receiving the King into the Roman church.

elements of government, thus to suffer a great number of subjects, and even subjects in high posts to be dependent on a foreign prince, and become devoted to him? Would a prudent sovereign receive men who preached such doctrines? There needed no more to cause all the missionaries to be driven from China.

§ 149.
4. The celibacy of the priests.
Convents.

The better to secure the devotion of clergy, the celibacy of church-men was invented. A priest, a prelate, already bound to the see of Rome by his functions and his hopes, finds himself also cut off from all connection with his country, by the celibacy he is obliged to deserve. He is not connected to the society by a family: his grand interests are all centered in the church; and provided he has the pope's favour, he is afraid of nothing: in what country soever he is born, Rome is his refuge, the centre of his adopted country. Every body knows that the religious orders are, like a papal militia, spread over the face of the earth, to support and advance the interest of their monarch. This is doubtless a strange abuse, subversive of the first laws of society. But this is not all: if the prelates were married, they might enrich the state with a number of good citizens; rich benefices affording them the means of giving their legitimate children a suitable education. But what a multitude of men are there in convents, consecrated to idleness under the cloak of devotion! equally useless to society in peace and war, they serve it neither by their labour in necessary professions, nor by their courage in arms; and yet enjoy immense revenues: for this purpose, the sweat of the people furnishes support for these swarms of sluggards. What should we think of a queen of bees who protected useless hornets to devour the honey of her subjects*? It is not the fault of these fanatic preachers of over-strained sanctity, if all their devotees do not imitate the celibacy of the monks. How have princes been able to bear their publicly extolling, as the most sublime virtue, a practice equally contrary to nature, and pernicious to society? Among the Romans, laws were made to diminish the number of the batchelors and to favour marriage†: but superstition made no delay in attacking such just and wise regulations; and the christian emperors, persuaded by churchmen, thought themselves obliged to abrogate them‡. Several of the fathers of the church have censured these laws of Augustus; *doubtless*, says a great man §, *with a laudable zeal for the things of another life; but with very little knowledge of the affairs of this*. This great man lived in the Roman church; he did not dare to say plainly, that voluntary celibacy is to be condemned with respect to conscience and the things of another life: but the conduct, most certainly worthy of a true piety, is to conform ourselves to nature, to fulfil the

* This reflection has no relation to the religious houses in which literature is cultivated. Establishments that afford a peaceful retreat to the learned, with all the leisure and tranquillity required in the study of the most profound sciences, are always laudable, and may be rendered very useful to the state.

† The law of Papia-Poppæa.

‡ In the Theodosian Code.

§ The président de Montesquieu, in his Spirit of Laws.

views of the Creator, and to labour for the welfare of society. If a person is capable of raising a family; if he marries; if he takes care to give his children a good education, he does his duty, and is really in the way of salvation.

The enormous and dangerous pretensions of the clergy, are also another consequence of this system that deprives the civil power of every thing relating to religion. In the first place, the ecclesiastics, under the pretence of the holiness of their functions, have raised themselves above all the other citizens, even the principal magistrates; and against the express orders of their master, who said to his apostles, *seek not the first places at feasts*, they have almost every where arrogated to themselves the first rank. Their head, in the Roman church, causes sovereigns to kiss his feet; emperors have held the bridle of his horse; and if bishops or even mere priests do not at present raise themselves above their prince, it is because the times will not permit it: they have not always been so modest; and one of the writers has presumed to say, that *a priest is as much above a king, as man is above a beast* *. How many authors, better known and more esteemed than this, have been pleased to revive and extol the foolish speech attributed to the emperor Theodosius I. *Ambrose has learnt me the great distance there is between the empire and the priesthood*.

§ 152.
Enormous
pretensions
of the clergy.
gy. Pre-
eminence.

We have already observed that ecclesiastics ought to be honoured: but modesty, and even humility is proper to them. Does it then become them to forget it themselves, while they preach it to others? I should not mention a vain ceremonial, was it not attended with very important consequences, from the pride with which it inspires many of the priests, and the impressions it makes on the minds of the people. It is essentially necessary to good order, that subjects should behold none in society so worthy of respect as their sovereign, and next to him, those on whom he has devolved a part of his authority.

Ecclesiastics have not stopped in so fair a path. Not contented with rendering themselves independent, with respect to their functions, aided by the court of Rome, they have even attempted to withdraw themselves entirely, and in all respects from the political authority. There have been times when an ecclesiastic could not be brought before a secular tribunal for any crime whatsoever. The canon law declares expressly, *It is indecent for laymen to judge a churchman* †. The popes Paul III. Pius V. and Urban VIII. by their bulls in *Cæni Domini*, excommunicated the lay judges who presumed to attempt the bringing ecclesiastics to their trial. Even the bishops of France have not been afraid to say on several occasions, *that they did not depend on any temporal power*; and these are the terms which the general assembly of the French clergy dared to use in the year 1656. *The decree of council having*

§ 157.
6. Independence, immunities.

* *Tantum sacerdos præstat regi, quantum homo bestiz: Stanislaus Ortelorius. Vide Tribsekov. Exerc. 1. ad Baron. Annal. Sec. 2. & Thomas. Not. ad Lancel.*

† *Indecorum est laicos homines viros ecclesiasticos judicare. Can. in nona auctione 22. XVI. q. 7.*

been read, was disapproved by the assembly, because it leaves the king judge of the bishops, and seems to submit their immunities to his judges *. There are decrees of the popes that excommunicate whoever imprisons a bishop. According to the principles of the church of Rome, a prince has not the power of punishing an ecclesiastic with death, though a rebel, or a malefactor; it is necessary for him to apply to the ecclesiastical power, and the latter, if it pleases, is to deliver him up to the secular arm, after having degraded him. History affords us a thousand examples of bishops that have remained unpunished, or been but slightly chastised for crimes which cost the lives of the greatest lords. John de Braganza, king of Portugal, caused those lords who had conspired his destruction, to be justly punished; but he did not dare to put to death the archbishop of Braga, the author of that detestable plot †.

A whole numerous and powerful order, withdrawn from the public authority, and rendered dependent on a foreign court, is an entire subversion of order in the republic, and a manifest diminution of the sovereignty. This is a mortal stab given to society in its very essence, that every citizen should submit to the public authority. Indeed the community which the clergy, in this respect, arrogate to themselves, is so contrary to the natural and necessary rights of a nation, that the king himself has not the power of granting it. But the ecclesiastics tell us, they derive this power from God himself: but till they have furnished any proof of their pretensions, let us adhere to this certain principle, that God desires the safety of states, and not what introduces into them disorder and destruction.

§ 152.
Immunity
of the
riches of
the church.

The same immunity is pretended with respect to the riches of the church. The state might, without doubt, exempt this wealth from all expences, when it was scarcely sufficient for the support of the ecclesiastics: but they ought to hold this favour only from the public authority, which has always a right to revoke it, whenever the welfare of the state makes it necessary. One of the fundamental and essential laws of all society being, that in case of necessity, the wealth of all the members ought to contribute proportionably to the common necessities; the prince himself cannot, of his own authority, grant an entire exemption to a very numerous and rich body, without being guilty of extreme injustice to the rest of his subjects, on whom, by this exemption, the burthen will entirely fall.

The goods of the church are so far from having an exemption on account of their belonging to God, that, on the contrary, it is for this very reason they ought to be taken the first, to procure the safety of the state. For nothing is more agreeable to the common Father of mankind than our saving a state from ruin. God himself having no need of any thing, the

* See the Translation of the Faits on the System of the Independency of Bishops.

† Revolutions of Portugal.

consecration of wealth to him is appropriating it to such uses as are agreeable to his nature. Besides, a great part of the revenues of the church, by the confession of the clergy themselves, is appointed for the poor. When the state is in necessity, it is doubtless the first and principal poor, and the most worthy of assistance. If we understood this in the most ordinary case, we must say, that applying a part of the current revenue of the church towards easing the people, is really giving it to the poor, according to its appointment. But it is really contrary to religion and the intentions of the founders, to apply to pomp and luxury, revenues that ought to be consecrated to the relief of the poor and miserable *.

It was, however, thought too little for the Romish ecclesiastics to render themselves independent: they undertook to bring mankind under their dominion; and indeed they had reason to despise the stupid mortals who suffered them to do it. Excommunication was formidable arms in the hands of ignorant and superstitious men, who neither knew how to reduce it to just bounds, nor to distinguish its use. Hence has arisen disorders even in some protestant countries. Popish ecclesiastics have presumed, by their mere authority, to excommunicate men in high employments, magistrates of use to the society, and have pretended that these officers of state being struck with the thunders of the church, could no longer discharge the duty of their posts. What a perversion of order and reason! What! shall not a nation be allowed to trust its affairs, its happiness, its repose and safety, in such hands as appear the most able and the most worthy of this trust? Shall a foreign power deprive the state, whenever it pleases, of its most wise conductors, of its firmest supports; and the prince of his most faithful subjects! So absurd a pretension has been condemned by princes, and even by some judicious and respectable prelates. We read in the 171st letter of Ives de Chartres, archbishop of Sens, that the royal capitularies, conformably to the third canon of the twelfth council of Trent, held in the year 681, enjoined the priests to receive to their conversation, those whom the royal majesty had received into favour, or to his table, though they had been excommunicated by them, or by others; in order that the church might not appear to reject or condemn those whom the king was pleased to employ in his service †.

The excommunications against the sovereigns themselves, accompanied with the absolutions of their subjects from their oaths of obedience, put the finishing stroke to this enormous abuse; and it is almost incredible that nations should suffer such odious attempts. We have just touched on this in § 145, and 146. The thirteenth century gives striking instances of it. Otho IV. for endeavouring to oblige several provinces of Italy to submit to the laws of the empire, was excommunicated, deprived of the empire by Innocent III. and his subjects freed from their oath of al-

§ 153.
Excommu-
nication of
men in high
posts.

§ 154.
And of so-
vereigns
themselves.

* See *Letters on the Pretensions of the Clergy*.

† See the same *Letters*.

legiance. In short, this unfortunate emperor was abandoned by the princes, and obliged to resign the crown to Frederic II. John king of England, resolving to maintain the rights of his kingdom, in the election of an archbishop of Canterbury, found himself exposed to the audacious enterprizes of the same pope. Innocent excommunicated the king; laid the whole kingdom under an interdict; declared John unworthy of the throne, and freed his subjects from their oath of fidelity; he instigated against him his own clergy, who excited his subjects to rebel; he persuaded the king of France to take up arms to dethrone him, publishing at the same time a crusade against him, as he might have done against the Saracens. The king of England at first appeared resolved vigorously to defend himself; but soon losing his courage, suffered himself to be brought to such an excess of infamy, as to resign his kingdoms into the hands of the pope's legate, to receive them back from him, and to hold them as a fief of the church, on the condition of paying tribute*.

The popes were not the only persons guilty of these attempts: there have been councils who have borne a part in them. That of Lyons, summoned by Innocent IV. in the year 1245, had the audacity to cite the emperor Frederic II. to appear before that body, in order to purge himself from the accusations laid against him, threatening him with the thunders of the church if he failed to do it. That great prince did not give himself much pain about so irregular a proceeding. He said, "that the pope resolved to make himself both a judge and a sovereign; but that from all antiquity, the emperors themselves had called councils, where the popes and prelates rendered to them, as to their sovereigns, the respect and obedience that was their due†." However, the emperor giving a little into the superstition of the times, condescended to send his ambassadors to the council, to defend his cause, which did not prevent the pope from excommunicating him, and declaring him deprived of the crown. Frederic, like a man of a superior genius, laughed at these vain fulminations, and behaved in such a manner, that he preserved the crown in spite of the election of Henry, Landgrave of Thuringia, whom the ecclesiastical electors and many bishops presumed to declare king of the Romans; but by that election he obtained nothing more than the ridiculous title of *king of the priests*.

I should never have done, were I to accumulate examples. To the dishonour of humanity, there are too many of them. The sight of that excess of folly to which superstition reduced the nations of Europe in these unhappy times, affords very humbling reflections.

§ 155.

30. The clergy drawing every thing to them, and disturbing the order of justice.

By the same spiritual arms the clergy drew every thing to themselves, usurped the authority of the tribunals, and disturbed the course of justice. They pretended to take cognizance of all

* Matthew Paris; *Turretin. Compend. Hist. Eccles. Secul. XIII.*

† Heiss's *History of the Empire, Book II. Chap. XVI.*

causes,

causes, on account of sin, the cognizance of which there is no person of good sense who does not know, says pope Innocent III. * belongs to our ministry. In the year 1329, the prelates of France dared to tell king Philip de Valois, that hindering them from bringing all causes before the ecclesiastical courts, was depriving the church of all its rights, *omnia ecclesiarum jura tollere* †. Thus they would decide all disputes. They boldly opposed the civil authority, and made themselves feared by proceeding in the way of excommunication. It even happened that the dioceses being not always confined to the extent of the political territories, a bishop would cite strangers before his court for causes merely civil, and attempted to determine them by a manifest violation of the law of nations. The disorders of these kinds were carried so far for three or four centuries, that our wise ancestors thought themselves obliged to take serious measures to put a stop to it; and stipulated in their treaties, that none of the confederates should be summoned before spiritual courts, for debts relating to money, since every one ought to be contented with the justice of the place ‡. We find in history that the Swiss on many occasions suppressed the encroachments of the bishops and their officers.

Over every affair of life they extended their authority, under the pretence that conscience was concerned: they made the new-married husbands purchase the permission of lying with their wives, the three first nights after marriage §.

This burlesque invention leads us to another abuse, manifestly contrary to the rules of a wise policy, and to what a nation owes to itself. I would mention here the immense sums, which bulls, dispensations, &c. drew annually to the court of Rome, from all the countries under its communion. How much might be said on the scandalous trade of indulgences! but it at last became ruinous to the court of Rome; for by endeavouring to gain too much, they suffered irreparable losses.

At length, this independent authority trusted to ecclesiastics, who were often too little capable of knowing the true maxims of government, or too careless of being informed about them, and were besides wholly given up to fanatical visions, empty speculations, and notions of a chimerical and ridiculous purity: this authority, I say, produced, under the pretence of sanctity, laws and customs that were pernicious to the state. We have touched upon some of these. Grotius mentions a very remarkable example of them. "In the antient Greek church, says he, was long observed a canon, by which those who had killed an enemy in any war whatsoever, were excommunicated for three

* In cap. novit. de Judiciis.

† See Leibnitii Codex juris cent. diplomat. Dipl. LXVII. § 9.

‡ Ibid. Alliance of Zurich with the cantons of Uri, Schwetz, and Underwald, dated May 1, 1351, § 7.

§ See A Regulation of Parliament in an arrat of March 19, 1409. Spirit of Laws. This was exactly, says M. de Montesquieu, the very nights they ought to have chosen; they would not have drawn great sums of money from the others.

"years *." A fine reward bestowed on the heroes who defended their country, and granted instead of the crowns and triumphs with which pagan Rome had honoured them. Pagan Rome becoming mistress of the world, adorned her bravest warriors with crowns: but the empire becoming Christian, soon became a prey to barbarians: her subjects by defending her, obtained the penalty of excommunication: while by leading an idle life, they thought themselves in the road to heaven, and actually found themselves in that of grandeur and riches.

C H A P. XIII.

Of Justice and Polity.

§ 158.
A nation
ought to
make justice
reign.

NEXT to the care of religion, one of the principal duties of a nation relates to justice. It ought to take the utmost care to make this virtue reign in the state; and to take proper measures that it be rendered to every one in the safest, the most speedy, and the least burthenfome manner. This obligation flows from the end, and the very contract of civil society. We have seen (§ 15) that men have bound themselves by the engagements of society, and consented to strip themselves, in its favour, of a part of their natural liberty, only with a view of enjoying what belongs to them in tranquillity, and of obtaining justice with safety. The nation would then be wanting to itself, and deceive the individuals, if it did not seriously apply to make the strictest justice flourish. This attention it owes to its own happiness, repose, and prosperity. Confusion, disorder, and discouragements will soon arise in a state, when the citizens are not secure of easily obtaining speedy justice, with respect to all their differences; without this, the civil virtues will become extinguished, and the society weakened.

§ 159.
To establish
good laws.

There are two methods of making justice flourish; good laws, and the attention of the superiors to see them executed. In treating of the constitution of a state (Chap. III.) we have already shewn, that a nation ought to establish just and wise laws, and have also pointed out the reasons, why we cannot here enter into the particulars of those laws. If men were always equally wise, just, and equitable, the law of nature would doubtless be sufficient for society. But ignorance, the illusions of self-love, and the violence of the passions, too often render these sacred laws ineffectual. Thus we see that all well-governed nations have perceived the necessity of positive laws. There is a necessity for general rules and forms, that each may clearly know his own claims without being misled by self-deception; it is necessary sometimes to deviate from natural equity, in order to prevent

* *De jure belli & pacis, Lib. II. Cap. XXIV.* He quotes *Basil ad Amphiloct. X.*
Zonar. in *Nach. Phas.* Vol. III.

frauds and abuse, and to accommodate ourselves to circumstances; and since the sensation of duty has frequently so little influence on the heart of man, it is necessary that the penal sanction of the law should add all their efficacy. Thus is the law of nature converted into civil law*. It would be dangerous to commit the interests of the citizens to the mere arbitrary will of those who ought to distribute justice. The legislature should assist the understanding of the judges, force their prejudices and inclinations, and subject their will to simple, fixed, and certain rules. This is the civil law.

The best laws are useless, if they are not observed. The nation ought then to take pains to maintain them, and to cause them to be punctually executed: no measures can be taken in this respect too just, too extensive, and too effectual; for on this, in a great measure, depends its happiness, glory, and tranquillity.

§ 163.
To make them observed.

We have already observed, § 41. that the sovereign who represents a nation and is invested with its authority, is also intrusted with its duties. The care of distributing justice must then be one of the principal functions of the prince, and nothing can be more worthy of the majesty of the sovereign. The emperor Justinian thus begins the book of his Institutes: *Imperatoriam majestatem non solum armis decoratam, sed etiam legibus oportet esse armatam: ut utrumque tempus & bellorum, & pacis, rectè possit gubernari*. The degree of power trusted by the nation to the head of the state, is then the rule of his duties and his functions in the administration of justice. So that the nation may either reserve the legislative power to itself, or trust it to a select body; it has also a right, if it thinks proper, to establish a supreme tribunal to judge of all disputes independently of the prince. But the conductor of the state must naturally have a considerable share in the legislature, and it may be even intrusted entirely to him. In this last case, it will be his duty to establish salutary laws, dictated by wisdom and equity: but in all cases, he should be the guardian of the law; he should watch over those that are to be put in force, and confine his people within the bounds of duty.

§ 164.
The functions and duties of the prince in this respect.

The executive power naturally belongs to the sovereign, and to every conductor of a people: he is even supposed to be invested with it, in its full extent, when the fundamental laws do not restrain him. When the laws are established, the prince is to cause them to be executed; to maintain them with vigour, and to make a just application of them to all cases that present themselves, which is called rendering justice. This is the duty of the sovereign, who is naturally the judge of his people. We have seen the chiefs of some small states perform these functions themselves; but this custom becomes inconvenient, and even impossible in great kingdoms.

§ 165.
How he ought to distribute justice.

The best and safest methods of distributing justice is by establishing judges of knowledge and integrity.

§ 166.
How he ought to distribute justice.

* See a dissertation on this subject, in *Philosophical Leisure*, page 71. and following.

lishing judges, distinguished by their integrity and knowledge, to decide all the disputes that may arise between the citizens. It is impossible for the prince to take upon himself this painful task; he has neither the time necessary to search into the bottom of all causes, nor to obtain the knowledge necessary to decide them. As the sovereign cannot, in person, discharge all the functions of government, he should reserve to himself, with a just discernment, those he may fulfil with success, and that are of most importance, and trust the other to the officers and magistrates who perform them under his authority. There is no inconvenience in trusting the decision of causes to a body of men of integrity, learning, and distinction; on the contrary, the prince can do nothing better; for in this respect, he most effectually performs the duty he owes to his people, when he gives them judges adorned with all the qualities suitable to ministers of justice: he has then nothing more to do but to watch over their conduct, in order that they may not neglect their duty.

§ 164.
The ordinary courts should determine causes relating to the revenue.

The establishment of courts of justice is particularly necessary, to decide the causes relating to the revenue; that is, all the disputes that may arise between those who are employed in behalf of the prince and the subjects. It would be very unbecoming, and highly improper for a prince, to resolve to be judge in his own cause: he cannot be too much on his guard against the illusions of interest and self-love; and when he can preserve himself from it, he ought not to expose his glory to the rash judgments of the multitude. These important reasons ought to prevent his referring the causes in which he is concerned, to the ministers and counsellors particularly attached to his person. In all well-regulated states, in countries that are really states, and not the dominions of a despotic prince, the ordinary tribunals decide the causes in which the sovereign is concerned, with as much freedom as those between private persons.

§ 165.
There ought to be established supreme courts of justice, wherein causes should be finally determined.

The end of all trials at law is justly to determine the disputes that arise between the citizens. As then the causes carried before a judge are decided, after examining all the circumstances and proofs relating to them, it is very proper, that for the greater safety, the party condemned should be allowed to appeal to a superior tribunal, where his sentence may be examined and reversed, if it be found to be ill founded; but it is necessary that this supreme tribunal should have the authority of pronouncing a definitive sentence without appeal, otherwise the whole proceeding will be vain, and the dispute remain undetermined.

The custom of having recourse to the prince himself, by laying a complaint at the foot of the throne, when the cause has been finally determined by a superior court, appears to be subject to very great inconveniences. It is more easy to deceive the prince by specious reasons, than a number of magistrates well skilled in the knowledge of the laws; and experience too plainly shews, what resources are obtained at court by favour and intrigues. If this practice be authorised by the laws of the state,

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the prince ought always to fear that these complaints are only formed with a view of drawing the suit to a great length, and deferring the submission to a just sentence. A just and wise sovereign will not admit them without great precautions; and though he dissolves the decree, he ought not to try the cause himself; but, as is done in France, commit it to the examination of another tribunal. The ruinous length of these proceedings, authorise us to say, that it would be more convenient, and of greater advantage to the state, to establish a sovereign tribunal, whose definitive decrees should not be capable of being reversed even by the prince himself. It is sufficient for the security of justice, that the sovereign keeps a watchful eye over the judges and magistrates, in the same manner as over all the other officers of the state, and that he has the power of the seeking for and punishing those who pervert justice.

As soon as this sovereign tribunal is established, the prince cannot interfere by his decrees, and, in general, he is absolutely obliged to guard and maintain the forms of justice. To undertake to violate them, is rendering himself an arbitrary monarch, to which it can never be presumed that a nation has willingly submitted. § 166.
The prince ought to preserve the forms of justice.

When these forms are prejudicial, it is the business of the legislature to reform them. This being done or procured in a manner agreeable to the fundamental laws, will be one of the most salutary benefits the sovereign can bestow upon a people. To preserve the citizens from the danger of ruin, by defending their rights, to suppress and stifle the monster chicanery, will be an action more glorious in the eyes of the wise, than all the exploits of a conqueror.

Justice is administered in the name of the sovereign: the prince refers it to the judgment of the courts. His part in this branch of the government is then to maintain the authority of the judges, and to cause their sentence to be executed; without which they would be vain, and to no purpose; for justice would not be rendered to the citizens. § 167.
The prince ought to maintain the authority of the judges.

There is another kind of justice named *attributive* or *distributive*, which in general consists of treating every one according to his merits. This virtue in a state regulates the distribution of public employments, honours, and rewards. A nation ought, in the first place, to encourage good citizens, to excite every one to virtue by rewards and honours, and to trust employments only to such subjects as are capable of properly discharging them. If a sovereign has the power of distributing his favours and employments to whomsoever he pleases, and nobody has a perfect right to any post or dignity; yet a man who by great application has enabled himself to become useful to his country, and he who has performed some signal service to the state, may justly complain if the prince overlooks them, in order to advance useless men without merit. This is treating them with an ingratitude that is very unjustifiable, and adapted only to extinguish emulation. There can be no fault that in a course of § 168.
Of distributive justice. The distribution of employments and rewards.

time can become more prejudicial to a state; it introduces in it a general relaxation, and the affairs conducted by able hands cannot fail of being attended with ill success. A powerful state sometimes maintains itself by its own weight; but at length it falls into decay, and this is perhaps one of the principal causes of those revolutions observable in great empires. The sovereign is attentive to the choice of those he employs, while he perceives himself obliged to watch over his safety, and to be on his guard; but as soon as he believes himself raised to such a point of grandeur and power, that leaves him nothing to fear, he delivers himself up to caprice, and all his places are distributed by favour.

§ 169.
The foundation of the right of punishing the guilty.

The punishment of the guilty, commonly belongs to distributive justice, of which it is really a branch; since good order requires that those punishments should be inflicted on malefactors which they have merited. But if we would clearly establish this on its true foundations, we ought to ascend to first principles. The right of punishing, which in a state of nature belonged to each individual, is founded on the right of safety. Every man has therefore a right to preserve himself from injury, and by force to provide for his own security, against those who unjustly attack him. For this purpose he may inflict a punishment on him who has done him an injury; both to put it out of his power to hurt him for the future, and to reform him, and by his example, confine within due bounds those who shall be tempted to imitate him. Now when men united in society, that society was from thenceforward entrusted with the power of providing for the safety of its members, and for that purpose every one resigned up to it the right of punishment. The whole body is then in protecting the citizens to revenge the injuries suffered by particular persons. And as it is a moral person, capable also of being injured, it has a right to provide for its safety, by punishing those who offend it; that is, it has a right to punish public delinquents. Hence arises the right of the sword, which belongs to a nation, or to its conductor. When he uses it against another nation, he makes war; when he exerts it in punishing a particular person, he exercises vindictive justice. Two things are to be considered in this part of government, the laws, and their execution.

§ 170.
Of the laws against criminals.

It would be dangerous to abandon entirely the punishment of the guilty, to the discretion of those who have the authority in their hands. The passions may interfere in affairs which ought to be regulated only by justice and wisdom. The pain assigned previously to a bad action, lays a more effectual restraint on the wicked, than a vague fear, about which they may deceive themselves. In short, the people who are commonly moved at the sight of a miserable wretch, are better convinced of the justice of his punishment, when it is inflicted by the laws themselves. Every well-governed state ought then to have its laws for the punishment of criminals. It belongs to the legislature, whatever that be, to establish them with justice and wisdom. But this is not a proper place for giving a general theory of them: we shall then

then only say, that each nation has a right to chuse, on this subject, as well as on all others, the laws most agreeable to circumstances.

We shall only make one observation which naturally flows from this subject, and relates to the degree of punishment. From the foundation even of the right of punishing, and from the lawful end of inflicting penalties, arise the necessity of keeping them within just bounds : for since they are designed to procure the safety of the state and of the citizens, they ought never to be extended beyond what that safety requires. To say that any punishment is just, when the guilty knew before-hand the miseries to which he exposed himself, is using a barbarous language, contrary to humanity and the law of nature, which forbid our doing any ill to others, unless they lay us under the necessity of inflicting it, in our own defence and for our own security. Whenever then a crime is not much to be feared in society, as when the opportunities of committing it are very rare, or when the subjects are not inclined to it, too rigorous punishments ought not to be used to suppress it. Attention ought also to be paid to the nature of the crime, and the punishment should be proportioned to the degree of injury done to the public tranquillity and the safety of society, and the wickedness it supposes in the criminal.

§ 171.
Of the degree of punishment.

These maxims are not only dictated by justice and equity, but prudence and the art of reigning recommend them with equal strength. Experience informs us, that the imagination becomes familiarised to objects that are frequently represented to it : if therefore, horrible punishments are multiplied, the people will become daily less affected by them, and at length contract, like the Japanese, an ungovernable cruelty : these bloody spectacles then no longer produce the effect designed ; for they cease to terrify the wicked. It is with respect to these examples as with honours ; a prince who multiplies titles and distinctions to excess, soon degrades them, and makes an ill use of one of the most powerful and most commodious springs of government. When we recollect the practice of the ancient Romans with respect to criminals, when we reflect on their scrupulous attention to spare the blood of the citizens, we cannot fail of being struck at the facility with which it is spilt in most states. Was then the Roman republic but ill governed ? Is there found more order and safety among us ? People are confined to their duty not so much by the cruelty of the punishments, as by the exactness with which they are executed : and if the man guilty of simple robbery is punished with death, what shall be reserved to guard the life of the citizens ?

The execution of the laws belong to the conductor of the state : he is intrusted with the care of it, and is indispensably obliged to discharge it with wisdom. The prince then is to put the laws against criminals in execution ; but he is not to attempt in his own person to try the guilty. Besides the reasons we have already alledged in treating of civil causes, and which are of still greater

§ 172.
Of the execution of the laws.

greater weight in regard to those of a criminal nature ; the character of the judge of a miserable wretch is not at all suitable, to the majesty of the sovereign, who ought in every thing to appear as the father of his people. It is a very wise maxim commonly received in France, that the prince ought to reserve all matters of favour to himself, and abandon the rigours of justice to the magistrates. But this justice ought to be exercised in his name, and under his authority. A good prince will keep a watchful eye over the conduct of the magistrates ; he will oblige them to observe scrupulously the established forms, and will himself take care never to break through them. Every sovereign who neglects or violates the forms of justice with respect to the guilty, makes large strides towards tyranny ; and there can be no liberty of the citizens, when they are not sure, that they can only be condemned according to law, by the established forms, and by their ordinary judges. The custom of committing the trial of the accused to commissioners chosen at the pleasure of the court, is a tyrannical invention of some ministers who have abused the authority of their master. By this irregular and odious means a famous minister always succeeded in destroying his enemies. A good prince will never give his consent to such a proceeding, if he has so much discernment as to foresee the horrible abuse that may be made of it. If the prince himself ought not to pass sentence, for the same reason, he ought not to increase the sentence passed by the judges.

§ 173.
Of the right
of granting
a pardon.

The very nature of government requires that the executor of the laws should have the power of dispensing with them, when this may be done without injury to any person, and when the welfare of the state requires an exception. Hence the right of granting a pardon is one of the prerogatives of sovereignty. But the sovereign in his whole conduct, in his severity as well as in his mercy, ought to have nothing in view but the greater advantage of society. A wise prince knows how to reconcile justice and clemency, the care of the public safety, and the mercy due to the unhappy.

§ 174.
Of polity.

Polity consists in the attention of the prince and magistrates to preserve every thing in order. Wise regulations ought to prescribe whatever will best contribute to the public safety, utility and convenience ; and those who have the authority in their hands, cannot be too attentive to their being observed. By a wise polity, the sovereign accustoms the people to order and obedience, and preserves peace, tranquillity and concord among the citizens : people have attributed to the magistrates of Holland singular talents with respect to polity ; their towns, and even their establishments in the Indies, are generally better governed than any other places in the known world.

§ 175.
Of duels, or
private
combats.

Laws and the authority of the magistrates being substituted in the room of a private war, the conductor of a nation ought not to suffer individuals to attempt to do themselves justice, when they may have recourse to the magistrates. A duel, a combat in which people engage on account of a private quarrel, is a manifest disorder,

order, contrary to the welfare of society. This phrenzy was unknown to the Greeks and Romans, who raised to such a height the glory of their arms; we received it from barbarous nations who knew no other law but the sword. Louis XIV. deserves the greatest praises, on account of his endeavours to abolish this savage custom.

But why did not they make this prince observe, that the most severe punishments were incapable of curing the madness of duelling? They did not reach the source of the evils; and since a ridiculous prejudice had persuaded all the nobility and gentlemen of the army, that honour obliges a man who wears a sword to revenge, with his own hand, the least injury he has received; this is the principle on which it is proper to proceed. We must destroy this prejudice, or restrain it by a motive of the same nature. While a gentleman, by obeying the law, shall be regarded by his equals as a coward and as a man dishonoured; while an officer in the same case, shall be forced to quit the service, would you hinder his fighting by threatening him with death? He, on the contrary, will place a part of his bravery in doubly exposing his life, in order to wash away the affront. And certainly while the prejudice subsists, while a gentleman or an officer cannot act in opposition to it, without imbittering the rest of his life, I do not know whether we can justly punish him who is forced to submit to its tyranny, nor whether he be very guilty with respect to morality. This honour, be it as false and chimerical as you please, is to him a very real and necessary blessing, since without it, he can neither live well with his equals, nor exercise a profession that is often his only resource. When therefore a man of a brutish disposition would unjustly ravish from him a chimera so esteemed and so necessary, why may he not defend it as he would his life and treasure against a robber? As the state does not permit an individual to pursue with arms in his hand the usurper of his fortune, only because he may obtain justice from the magistrate; so if the sovereign will not allow him to draw his sword against him from whom he has received an insult, he ought necessarily to take such measures that the patience and obedience of the citizen insulted, be no prejudice to him. The society cannot deprive man of his natural right of making war against an aggressor, without furnishing him with another means of securing himself from the evil his enemy would do him: for on all those occasions, where the public authority cannot lend us its assistance, we resume our primary right of natural defence. Thus a traveller may kill without difficulty the robber who attacks him on the highway; because, at that instant, he would in vain implore the protection of the laws, and of the magistrate. Thus a chaste virgin would be praised for taking away the life of a brutal ravisher who attempted to force her to his desires.

Till men have got rid of this Gothic idea, that honour obliges them to revenge, with their own hands, personal injuries by

§ 176.

The means of putting a stop to this disorder.

a con-

a contempt even of the laws, the most certain method of putting a stop to this prejudice, would be perhaps to make a distinction between the offended and the aggressor ; to grant without difficulty favour to the first, when it appears that his honour has been really attacked, and to punish without pity him that has committed the outrage. Those who draw the sword for trifles and punctilios, from pique or raillery, in which honour is not concerned, I would have severely punished. In this manner those ill-natured and impudent people would be restrained, who frequently oblige even the wife to suppress their insolence. Every one would be on his guard, to avoid being considered as the aggressor ; and being willing to obtain the advantage ; should a duel become necessary, without incurring the penalties of the law, both sides would curb their passions, by which means the quarrel would fall of itself, and be attended with no consequences. It frequently happens that a bully is at bottom a coward ; he behaves with insolence and offers insult, with the hopes that the rigour of the law will oblige the person he abuses, to put up with his affronts. In the mean time, the man of courage runs any danger rather than be insulted ; the aggressor does not dare to draw back ; and a combat ensues that would not have taken place, if the last had reason to believe that the same law which condemns him, absolves the offended, and that nothing can hinder the latter's punishing his audacity.

To this first law, the efficacy of which, I do not doubt, would be known by experience, it would be proper to add the following regulations. 1. Since custom has allowed persons of rank and gentlemen of the army to bear arms in time of peace, strict care should be taken that none but these should be allowed to wear swords, 2. It would be proper to establish a particular court, to determine, in a summary manner, all the affairs of honour between the persons of these two orders. The marshals court in France is in the possession of this power ; and it might be invested with it in a more formal and extensive manner. The governors of provinces and strong places, with their general officers, and the colonels and captains of each regiment, should, for this purpose, be constituted a part of the marshalsea. These courts, each in his department, should alone confer the right of wearing a sword. Every gentleman at sixteen or eighteen years of age, and every soldier at his entrance into the regiment, should be obliged to appear before the court to receive the sword. 3. On its being there delivered to each, he shall be informed, that it was intrusted with him only for the defence of his country, and care might be taken to inspire him with ideas of true honour. 4. It appears to me of great importance, to order very different pains and penalties, for cases that are of a different nature. The nobility might be degraded from the honour of wearing arms, and those suffer corporal punishment who so far forgot themselves as to injure, either in word or deed, a person who wears a sword ; death itself should ever be inflicted when the affair is attended with very aggravating cir-

circumstances; and, according to my first observation, no favour should be offered him, where it is followed by a duel; at the same time his adversary should be entirely acquitted. Those who fight on slight occasions, I would not have condemned to suffer death, unless in such cases where the author of the quarrel, I mean he who carried it so far as to draw his sword, or to appeal to its decision, shall kill his adversary. People hope to escape the punishment, when it is too severe; and besides, a capital punishment, in such cases, is not considered as a brand of infamy. If the nobility be shamefully degraded from the use of arms, and for ever deprived of the right of bearing a sword, without the least hope of pardon: this would be the most proper method of restraining men of courage; provided that due care was taken to make a distinction between the guilty, according to the degree of the offence. As to persons of mean rank, who do not belong to the army, their quarrels ought to be decided by the ordinary courts, and punished for shedding blood, according to the common laws against violence and murder. It should be the same with respect to the quarrels that arose between a mean person and a man of the sword: for it would be the business of the magistrate to preserve peace and order among men who can have no disputes in relation to *honour*. To protect the people against the violence of those who bear arms, and to punish them severely, if they shall dare to insult them, might still be, as it is at present, the business of the magistrate.

I dare believe that these regulations, and this method of proceeding, would stifle a monster, which the most severe laws have been unable to bind. They reach the source of the evil by preventing quarrels, and oppose a lively sensation of true and real honour to that false and punctilious honour which has occasioned the spilling of so much blood. It would be worthy a great monarch to make a trial of it: the success would immortalize his name; and by the bare attempt he would merit the love and gratitude of his people.

C H A P. XIV.

The third Object of a good Government, is to fortify itself against Attacks from without.

WE have treated at large of what relates to the felicity of a nation: the subject is equally rich and complicated. We come now to a third division of the duties of a nation with respect to itself, to a third object of good government. One of the ends of political society is to defend itself, by means of its union, from all insults or violence from without (§ 15.) If the society is not in a condition to repulse an aggressor, it is very imperfect; it wants its principal support, and cannot long subsist. The nation

§ 177.

A nation ought to fortify itself against attacks from without.

tion ought to put itself in such a state as to be able to repel and humble an unjust enemy ; this is an important duty, which the care of its perfection, and even preservation itself, imposes both on the state and its conductor.

§ 178.
Of the
power of a
nation.

By its power a nation may repulse aggressors, secure its rights, and render it every where respectable. Every thing invites it to neglect nothing in order to put itself in this happy situation. The power of a state consists in three things, the number of the citizens, their military virtues, and their riches. We may comprehend under this last article, fortresses, artillery, arms, horses, ammunition, and, in general, all that immense number of particulars which are at present necessary in war, since they cannot be procured without money.

§ 179.
The multi-
plication of
the citizens.

The state, or its conductor, ought then first to apply himself to multiply the number of the citizens, as much as is possible and convenient. He will succeed in this by making plenty reign in the country ; by procuring the people the means of obtaining, by their labour, food for their families ; by establishing proper orders, that the inferior subjects, and especially the labourers, be not vexed and oppressed by the levying of taxes ; by governing with mildness, and in a manner that, far from disgusting and dispersing subjects, draws many new ones to the state ; and, in short, by encouraging marriage, after the example of the Romans. We have remarked (§. 149.) that this people, so attentive to every thing capable of encreasing and supporting their power, made wise laws against celibacy, and granted privileges and exemptions to married men, particularly to those who had numerous families : laws that were equally wise and just, since a citizen who raises subjects to the state, has a right to expect more favour from it than he who desires only to live for himself.

Every thing tending to depopulate a country, is a vice in a state not overburthened with inhabitants. We have already spoken of convents and the celibacy of the priests. It is strange that establishments, so directly contrary to the duties of a man and a citizen, as well as to the advantage and safety of the society, should have found such favour, and that princes should be so far from opposing, as they ought, that they have protected and enriched them. A policy tending to take advantage of superstition in order to extend its power, made princes and their subjects mistake their real duty, and blinded sovereigns even with respect to their own interest. Experience seems at length to have opened the eyes of nations and their conductors ; the pope himself (let us mention it to the honour of Benedict XIV.) has endeavoured to reduce, by little and little, so palpable an abuse ; by his orders none in his dominions are any longer permitted to take the vow of celibacy before they are twenty-five years of age. This wise pontif gives the sovereigns of his communion a salutary example ; he invites them to attend at length to the safety of their states ; to shut up, at least, the avenues to the gulph that swallows them up, if they cannot close it entirely.

Travel
through

through Germany, and the other countries where advantages are equally the same, and you will see the protestant states twice as populous as those of the catholics : compare Spain, a desert, to England pouring forth its inhabitants : see fine provinces even in France, in want of men to cultivate the earth, and say if the thousands of both sexes shut up in convents, would not serve God and their country infinitely better, by producing labourers to cultivate those rich fields ? It is true the Swiss catholics are very numerous : but this is owing to a profound peace and the nature of the government, which abundantly repairs the losses occasioned by convents. Liberty is able to remedy the greatest evil ; it is the soul of a state, and was with great justice called by the Romans *alma Libertas*.

A cowardly and undisciplined multitude are incapable of repulsing a warlike enemy : for the strength of the state consists less in the number than in military virtue of its citizens. Valour, that heroic virtue, which makes us brave dangers for the sake of our country, is the firmest support of the state : it renders it formidable to its enemies, and spares the people even the trouble of defending themselves. A state whose reputation in this respect is once well established, will be seldom attacked, if it does not provoke other states by its enterprises. For above two centuries the Swiss have enjoyed a profound peace, while the noise of arms have resounded all around them, and war has laid waste the rest of Europe. Nature gives the foundation of valour ; but several causes may animate, or weaken and destroy it. A nation ought then to obtain and cultivate a virtue so useful, and a prudent sovereign will take all possible measures to inspire his subjects with it, his wisdom will point out to him the means. This is the bright fire that animates the French nobility : inflamed by a love of glory and of their prince, they fly to battle, and with the utmost gaiety spill their blood in the field of honour. How far would their conquests extend if that kingdom was not surrounded by people equally warlike ? The English, generous, and intrepid, resemble a lion in combat, and in general, the nations of Europe surpass in bravery all the other people upon earth.

But valour in war does not always succeed, a constant success is only to be obtained by an assemblage of all the military virtues. History shews us the importance of knowledge in generals, of military discipline, frugality, strength of body, of dexterity, and of being inured to fatigue and labour. These are so many distinct parts which a nation ought carefully to improve. It was this that carried so high the glory of the Romans, and rendered them the masters of the world. We should be mistaken were we to believe that valour alone produced those illustrious actions of the ancient Swiss, the victories of Morgarten, Sempach, Laupen, Morat, and many others. The Swiss not only fought with intrepidity, they studied the art of war, they were hardened by labour, they put in practice every stratagem, and the love of liberty itself made them submit to a discipline, that could alone se-

§ 180.

Of valour.

§ 181.

Of other military virtues.

cure to them this treasure, and save their country. Their troops were not less celebrated for their discipline than their bravery. Mezeray, after having given an account of the behaviour of the Swiss at the battle of Dreux, adds these remarkable words: "in the opinion of all the commanders on both sides who were present, the Swiss had in that battle on several trials, the superiority, in point of military discipline, over the infantry and cavalry of the French and Germans, and acquired the reputation of being the best infantry in the world."

§ 182.
Of riches.

In short, the wealth of a nation constitute a considerable part of its power, especially now, when war requires such immense expences. The nation's riches are not only the revenues of the sovereign, or the public treasure; its opulence is also rated from the riches of the individuals. We commonly call a nation rich, when it contains a great number of citizens in easy and affluent circumstances. The wealth of private persons really encrease the strength of the nation; since they are capable of contributing large sums towards supplying the necessities of the state, and even in a case of extremity, the sovereign may employ all the riches of his subjects in the defence, and for the safety of the state, in virtue of the high prerogatives with which he is invested, as we shall afterwards shew. The nation then ought to endeavour to acquire those public and private riches, that are of such use to it: and this is a new reason for encouraging a commerce with other nations, which is the source from whence they flow; and a new motive for the sovereign to have his eye fixed on all the foreign trade carried on by his subjects in order to preserve and protect the profitable branches, and to cut off those that occasion the exportation of gold and silver.

§ 183.
Of the revenues of the state, and taxes.

It is necessary that the revenues of the state should be proportionable to its necessary expences. These revenues may be produced several ways; by lands reserved for that purpose, by contributions, taxes, &c. but of this subject we shall treat in another place.

§ 184.
The nation ought not to encrease its power by illegal means.

In this the nation's power consists, and here it ought to augment and encrease it. But can it be necessary here to observe, that this can only be done by just and innocent methods? A laudable end is not sufficient to legitimate the means; for these ought to be in their own nature lawful. The law of nature cannot contradict itself; if it forbids an action as unjust or dishonest in its own nature, it can never permit it, upon any view whatsoever. And therefore if we cannot arrive at a good and lawful end, without employing unlawful means, this end should be considered as impossible to be obtained, and must be abandoned. Thus we shall shew, in treating of the just causes of a war, that a nation is not allowed to attack another with a view to aggrandize itself, and render it subject to its laws. This is the same as if a private person should endeavour to enrich himself by seizing the wealth of another.

The power of a nation is relative, and ought to be measured by that of its neighbours, or by that of all the people from whom it has any thing to fear. The state is sufficiently powerful, when it is capable of causing itself to be respected, and of repelling who ever would attack it. It may be placed in this happy situation either by its own strength, in keeping it upon a level, or even raising it above the strength of its neighbours, or by preventing their rising to a predominant and formidable power. But we cannot shew here, in what cases, and by what means, a state may justly set bounds to the power of another : it is necessary first to explain the duties of a nation towards others, in order to combine them afterwards with its duties towards itself. We shall only say for the present, on this subject, that a nation in following the rules of prudence, and a wise policy, ought never to lose sight of those of justice.

C H A P. XV.

Of the Glory of a Nation.

THE glory of a nation depends entirely on its powers, and forms a considerable part of it. It is this shining advantage that procures the esteem of other nations, and renders it respectable to its neighbours. A nation whose reputation is well established, and principally that whose glory is illustrious, is courted by all sovereigns : they desire the friendship of its sovereign, and are afraid of offending him. His friends, and those who wish to become so, favour his enterprises, and the envious dare not shew their ill-will.

It is then of great advantage to a nation for it to establish its glory and reputation ; and hence this becomes one of the most important of those duties it owes to itself. True glory consists in the favourable opinion of men of wisdom and discernment : it is acquired by virtue, or the qualities of the mind and the affections, and by the great actions that are the fruit of these virtues. A nation may deserve it from a double title ; first, by what it does in its national character, by the conduct of those who have the administration of its affairs, and are invested with its authority and government ; and, secondly, by the merit of the persons of whom the nation is composed.

A prince, a sovereign, whoever he is, that owes every thing entirely to the nation, is doubtless obliged to extend its glory, as far as is in his power. We have seen that his duty is to labour after the perfection of the state, and of the people who have submitted to him ; and by this means he will make them merit a good degree of reputation and glory. He ought always to have this object in view in every thing he undertakes, and in the use he makes of his power. Let justice, moderation, and greatness of soul shine in all

his actions; for by this means he will procure to himself and his people a name respected by the universe, and not less useful than glorious. The glory of Henry IV. saved France: in the deplorable state in which he found affairs, his virtues encouraged his faithful subjects, gave strangers the boldness to lend him their assistance, and to enter into an alliance with him against the ambitious Spaniards. A prince weak and but little esteemed, would have been abandoned by all the world; people would have been afraid of being involved in his ruin.

Besides the virtues that are the glory of princes, as well as of private persons, there is a dignity and decorum that particularly belong to the supreme rank, and which a sovereign ought to observe with the greatest care. He cannot neglect them without degrading himself, and stamping a blemish on the state. Every ray that beams from the throne, ought to bear the character of purity, nobleness, and grandeur. What an idea do we conceive of a people, when we see the sovereign shew in public acts a meanness of sentiment, with which a private person would think himself dishonoured? All the majesty of the nation resides in the person of the prince? what then must become of it if he prostitutes it, or suffers it to be prostituted by those who speak and act in his name? The minister who treats his master in a language unworthy of him, deserves to be disgracefully driven from his post.

§ 129.
The duty
of citizens.

The reputation of private persons is diffused on the nation, from a manner of speaking and thinking equally common and natural. In general we attribute a virtue or a vice to a people, when that vice, or that virtue is very frequently observed among them. We say that a nation is warlike, when it produces a great number of brave warriors; that it is learned, when there are many learned men among the citizens; and that it excels in the arts, when it produces many able artists: on the contrary we call it cowardly, lazy or stupid, when more men of those characters are observed there than elsewhere. The citizens, who are obliged to labour with all their power to promote the welfare and advantage of their country, not only owe to themselves the care of deserving a good reputation; but they also owe it to the nation, whose glory is so capable of being influenced by theirs. Bacon, Newton, Descartes, Leibnitz, and Bernouilli, have done honour to their country, and have served it greatly by the glory they have acquired. Great ministers, and, great generals, an Oxenstiern, a Turenne, a Marlborough, a Ruiter, served their country in a double capacity, both by their actions, and their glory. On the other hand, a good citizen will find a new motive to abstain from every dishonourable action, from the fear of the dishonour that may be reflected on his country. And the prince ought not to suffer his subjects to give themselves up to vices that may cast infamy on a nation, or only tarnish the brightness of his glory: he has a right to suppress and to punish scandalous enormities, that do a real injury to the state.

The

The example of the Swifs is very proper to let us see the advantages of the glory to a nation. The high reputation for valour they have acquired, and still nobly maintain, has preserved them in peace for above two centuries, and has made their assistance sought by most of the powers in Europe. Louis XI. while dauphin, was witness of the prodigies of valour they performed at the battle of St. James, near Basil, and he then formed the design of strictly engaging in his interest so intrepid a nation *. The twelve hundred brave men, who on this occasion first defeated the vanguard of the Armagnacs, which was eighteen thousand strong; afterwards rashly engaging the body of the army, almost all of them perished † without being able to complete their victory. But besides their terrifying the enemy, and preserving Switzerland from a ruinous invasion, they did it great service by the glory they acquired by their arms. A reputation for an inviolable fidelity is not less advantageous to that nation, and they have in all times been jealous of preserving it. The canton of Zug punished with death, that unworthy foldier who betrayed the confidence of the duke of Milan, and discovered that prince to the French, when to escape them, he had placed himself in the ranks of the Swifs, who marched out of Novare dressed like one of those foldiers ‡.

§ 190.
The example of the Swifs.

Since the glory of a nation is a very great advantage, it has a right to defend it; as well as any other advantages. He who attacks its glory does it an injury; and it has a right to demand, even by force of arms, a just reparation. We cannot then condemn those measures sometimes taken by sovereigns to maintain or revenge the dignities of their crown. They are equally just and necessary. When they do not proceed from too high pretensions, attributing them to a vain pride, is shewing ourselves greatly ignorant of the art of reigning, and despising one of the firmest supports of the grandeur and safety of a state.

§ 191.
Attacking the glory of a nation is doing it an injury.

C H A P. XVI.

Of the Protection sought by a Nation, and its voluntary submission to a foreign Power.

WHEN a nation is not capable of preserving itself from insult and oppression, it may procure the protection of a more powerful state. If it obtains this by only engaging to perform certain articles, by paying tribute, as an acknowledgment for the

§ 192.
Of the protection.

* See the *Memoirs of Commynes*.

† Of this small army, "it was computed that there were eleven hundred and fifty-eight killed, and thirty-two wounded. Twelve men only escaped, who were considered by their countrymen as cowards, that had preferred a life of shame to the honour of dying for their country." *History of the Helvetic Confederacy*, by M. de Watteville, Vol. I. p. 250, and following. Tschudi, p. 425.

‡ Vogel's *Historical and Political Treatise of the Alliances between France and the Thirteen Cantons*, pag. 75. 76.

safety obtained; by furnishing its protector with troops, and rendering all the wars between each a common cause; in all other respects reserving to itself the prerogatives of government at its pleasure, it is a simple treaty of protection, that does not at all derogate from its sovereignty, and has no other difference between it, and ordinary treaties of alliance, than what arises from the difference it produces in the dignity of the contracting parties.

§ 193.
Voluntary
submission
of one na-
tion to an-
other.

But they sometimes proceed much farther, and as a nation is under an obligation to preserve with the utmost care the liberty and independence derived from nature, when it has not sufficient strength of itself, and is not in a condition to resist its enemies, it may lawfully submit to a more powerful nation on certain conditions, upon which they shall come to an agreement; and the pact or treaty of submission will be afterwards the measure and rule of the rights of each. For that which submits, resigning a right it possessed, and conveying it to another, has an absolute power to make this conveyance upon what conditions it pleases, and the other by accepting the submission on this footing, engages to observe religiously all the clauses in the treaty.

§ 194.
Several
kinds of
submission.

This submission may be varied to infinity, according to the will of the contracting parties: it may either leave the inferior nation a part of the sovereignty, restraining it only in certain respects; or it may totally abolish it, so that the superior nation shall become the sovereign of the other; or, in short, the least may be incorporated with the greatest, in order to form, from thence forward, only one single state, and then the citizens will have the same privileges as those with whom they are united. The Roman history furnishes examples of each of these three kinds of submission: as 1. The allies of the Roman people, such as were for a long time the Latins, in several respects depended on Rome, but yet were governed according to their own laws, and by their own magistrates: 2. The countries reduced to Roman provinces, as Capua, whose inhabitants submitted absolutely to the Romans*. In short, the people to whom Rome granted the privilege of citizens. The emperors afterwards granted this right to all the people subject to the empire, and this transformed all their subjects into citizens.

§ 195.
The right
of citizens,
when the
nation sub-
mits to a
foreign
power.

In the case of a true subjection to a foreign power, the citizens who do not approve this change are not obliged to submit to it; they ought to be allowed to sell their effects and retire elsewhere. For by being entered into a society, I am not obliged to follow its state, when it has dissolved itself, in order to submit to a foreign dominion. I submitted to the society as it was, to live in that society as the member of a sovereign state, and not in another: I ought to obey it, while it remains a political society: but

* Itaque populum Campanum, urbemque Capuam, agros, delubra Deum, divina humanaque, omnia, in vestram, patres conscripti, populique Romani ditionem cedimus. *Tit. Liv. lib. VII. Cap. 31.*

when

when it strips itself of that quality in order to be governed by the laws of another state, it cuts the knot which united its members, and thus discharges their obligations.

When a nation has placed itself under the protection of another that is more powerful, or has submitted to it with a view of protection; if this last does not effectually grant its protection when wanted, it is manifest, that by failing in its engagements, it loses all the rights it had acquired by the convention, and that the other, being disengaged from the obligation it had contracted, re-enters into the possession of all its rights, and recovers its independence, or its liberty. It must be remarked, that this takes place even in the case where the protector does not fail in his engagements by a want of good faith, but merely through inability. For the weaker nation having submitted only to obtain protection; if the other does not find itself in a situation that will admit of its fulfilling that essential condition, the pact is dissolved; the weaker resumes its right, and may, if it thinks proper, have recourse to a more effectual protection *. Thus the dukes of Austria, who had acquired a right of protection, and in some sort a sovereignty over the city of Lucern, not being willing, or unable to protect it effectually, that city concluded an alliance with the three principal cantons: and the dukes having carried their complaint to the emperor, the inhabitants of Lucern replied, "that they used the natural right common to all men, by which every one is permitted to endeavour to procure his own safety when he is abandoned by those who are obliged to grant him assistance †."

§ 196.
These
pacts an-
nulled by
the failure
of protec-
tion.

The law is the same with respect to the two contracting parties: if the protected does not fulfill his engagements with fidelity, the protector is discharged from his; he may afterwards refuse the protection, and declare the treaty broken, in case the situation of his affairs renders such a step most to his advantage.

§ 197.
Or by the
infidelity of
the pro-
tected.

In virtue of the same principle, which discharges one of the contracting parties, when the other fails in its engagements, if the superior power would arrogate to itself more privileges than the treaty of protection or submission allows, the other may consider the treaty as broken, and provide for its safety in such a manner as appears most prudent. If it were otherwise, the inferior nation would lose by a convention which it had only formed with a view to its safety; and if it was still bound by its engagements when its protector abused and openly violated his, the treaty would become a snare. However, as some have pretended, that in this case the inferior nation has only the right of resistance and of imploring a foreign assistance; particularly as the weak cannot take too many precautions against the powerful,

§ 198.
And by the
enterprizes
of the pro-
tector.

* We speak here of a nation that has rendered itself subject to another, and not of one that is incorporated with another state, so as to constitute a part of it. The last is in the situation of all other citizens: we shall treat of it in the following chapter.

† See *The History of Switzerland*.

who are able to colour over their enterprizes, the safest way is to insert in this kind of treaty a particular clause, that declares it null and void whenever the superior power shall arrogate to itself claims not expressly granted in the treaty.

§ 199.
How the
right of the
nation pro-
tected is
lost by its
silence.

But if the nation that is protected, or that has submitted to certain conditions, does not resist the enterprizes of that power from which it has sought support; if it has made no opposition to them; if it preserve a profound silence, when it might and ought to have spoken; its patience, for a considerable time, forms a tacit consent that legitimates the rights of the usurper. There can be nothing stable among mankind, especially among nations, if a long possession, accompanied by the silence of the persons concerned, does not produce a degree of right. But it must be observed, that silence, in order to shew tacit consent, ought to be voluntary. If the inferior nation proves that violence and fear prevented its giving testimonies of its opposition, nothing can be concluded from its silence, and it can give no right to the usurper.

C H A P. XVII.

How a Country may separate itself from the State of which it is a Member, or renounce the Obedience of its Sovereign when it is not protected.

§ 200.
The differ-
ence be-
tween the
present
case and
those in the
preceding
chapter.

WE have already said, that an independent people, who without becoming the members of another state, have voluntarily rendered themselves subject to it, in order to obtain protection, are free from its engagements as soon as that protection fails, even though it happens through the inability of the protector. But we ought not to conclude that it is the same, with any people, when their natural sovereign, or the state of which they are members, cannot speedily and effectually protect them. The two cases are very different. In the first, a free nation has submitted to another state, to obtain a share in all its advantages, and to be protected in common with its own subjects; if the latter is willing to grant the favour, it may be incorporated and not subjected; for it sacrificed its liberty with the sole view of being protected, without the hope of any other return. When therefore the only necessary condition of its subjection fails, in whatsoever manner it happened, it is free from its engagements, and its duty towards itself obliges it to take fresh methods to provide for its own security. But the several members of the same state equally participating in all the advantages it procures, ought constantly to support it: they have promised to remain united, and to render it, on all occasions, the common cause. If those who are menaced or attacked, may separate themselves from the others to avoid a present danger, every state would soon

be dissipated and destroyed. It is then essentially necessary for the safety of society, and even for the welfare of all its members, that each party should with all its power resist a common enemy, rather than separate from the other, and this is consequently one of the necessary conditions of the political association. The natural subjects of a prince are attached to him without any other reserve, than the observation of the fundamental laws; they ought to remain faithful to him, just as he is obliged to take care to govern them well: they have one common interest; they with him make only one whole, one and the same society. It is then an essential and necessary condition of the political society, that the subjects remain united to their prince, as much as is in their power.

When, therefore, a city, or a province is threatened, or actually attacked; it cannot deliver itself from danger, by separating from the state of which it is a member, or abandon its natural prince, even when it is not in his power to give it a present and effectual assistance. Its duty, its political engagements, oblige it to make the greatest efforts, in order that it may still remain in its present state. If it is overcome by force, necessity, that irresistible law, frees it from its first engagement, and gives it a right to treat with the conqueror, in order to obtain the best conditions possible. If it must either submit to him or perish, who can doubt, but that it may, and even that it ought, to chuse the first? The modern custom is conformable to this decision: a city submits to the enemy when it cannot expect safety from a vigorous resistance; it takes an oath of fidelity to him, and its sovereign accuses none but fortune.

The state is obliged to defend and preserve all its members (§ 17.) and the prince owes the same assistance to his subjects. If he refuses, or neglects to succour a people, who find themselves in imminent danger, this people being thus abandoned, become absolutely at liberty to provide for their own security and safety, in a manner most agreeable to them without shewing the least regard to those who fail to assist them. The country of Zug attacked by the Swiss in 1352, sent for succour to the duke of Austria its sovereign, but that prince being employed in talking of his birds, when the deputies appeared before him, would scarcely condescend to hear them; upon which this people, thus abandoned, entered into the Helvetic confederacy*. The city of Zurich was in the same situation the year before. Being attacked by the rebellious citizens, supported by the neighbouring nobility, and by the house of Austria, it applied to the head of the empire; but Charles IV. who was then emperor, declared that he could not defend it, upon which Zurich secured its safety, by an alliance with the Swiss†. The same reason has authorised the Swiss in general, to separate themselves entirely from the empire, which

§ 201.
The duty of the members of a state, when the subjects of a prince are in danger.

§ 202.
Their right when they are abandoned.

* See Etterlin, Simber and de Watterville, *ubi supra*.

† See the same historians, and Bullinger, Stumpf, Tschudi, and Stettler.

never

never protected them in any emergency : they had not owned its authority for a long time when their independence was acknowledged by the emperor, and the whole germanic body at the treaty of Westphalia.

C H A P. XVIII.

Of the Establishment of a Nation in a Country.

§ 203.
The possession of a country by a nation.

HITHERTO we have considered the nation merely with respect to itself, without any regard to the country it possesses. Let us now see it established in a country, which becomes its own property and inheritance. The earth belonged to all men in general ; destined by the creator to be their common habitation, and nursing-mother, all derived from nature the right of inhabiting it, and drawing from it the things necessary for their subsistence, and those suitable to their wants. But the human race being extremely multiplied, the earth became no longer capable of furnishing spontaneously, and without culture, support for its inhabitants ; and could not receive a proper cultivation from the itinerant nations who had possessed it in common. It then became necessary that these people should fix themselves on some part of it, and that they should appropriate to themselves portions of land, in order that not being disturbed in their labour, nor disappointed in obtaining the fruits of their industry, they might apply themselves to render their lands fertile, that they might draw their subsistence from them. This must have introduced the rights of *property* and *dominion*, and this fully justifies their establishment. Since their introduction, the common right of all mankind is restrained to what each lawfully possesses. The country inhabited by one nation, whether it has transported itself thither, or whether the families of which it was composed, finding themselves spread over the country, had formed themselves into the body of a political society ; this country, I say, is the settlement of the nation, and it has a proper and exclusive right to it.

§ 204.
Its right over the parts in its possession.

This right comprehends two things : 1. The *domain*, in virtue of which the nation alone may use this country for the supply of its necessities, and may dispose of it in such a manner, and derive from it such advantages, as it thinks proper. 2. The *empire*, or the right of sovereign command, by which the nation ordains and regulates at its pleasure, every thing that passes in a country.

§ 205.
The possession of the empire in a vacant country.

When a nation takes possession of a country that never yet belonged to another, it is considered as possessing there the *empire* or sovereignty, at the same time with the *domain*. For since it is free and independent, it can have no intention in settling in a country, to leave the others the right of command, or any of those that constitute sovereignty. The whole space over which a

nation

nation extends its government, is the seat of its jurisdiction, and called its *territory*.

If many free families spread over an independent country, come to unite, in order to form a nation or state, they all together possess the empire over the whole country they inhabit. For they already possess each for himself the domain; and since they are willing to form together a political society, and establish a public authority, which each should be bound to obey, it is a very manifest that their intention is, to attribute to that public authority, the right of command over the whole country.

All mankind have an equal right to the things that have not yet fallen into the possession of any one; and these things belong to the first possessor. When therefore a nation finds a country uninhabited and without a master, it may lawfully take possession of it: and after it has sufficiently made known its will in this respect it cannot be deprived of it by another. Thus navigators going on the discovery, furnished with a commission from their sovereign, and meeting with islands, or other desert countries, have taken possession of them in the name of their nation: and this title has been commonly respected, provided it was soon after followed by a real possession.

But it is questioned whether a nation may thus appropriate to itself, by merely taking possession of a country, which it does not really occupy, and in this manner reserve to itself much more than it is able to people or cultivate. It is not difficult to determine, that such a pretension would be absolutely contrary to the law, and opposite to the views, of nature, who appointing all the earth to supply the wants of man in general, gave to no nation the right of appropriating to itself a country but for the use it makes of it, and not to hinder others from improving it. The law of nations then only acknowledge the property and sovereignty of a nation over uninhabited countries, of which they shall really, and in fact, take possession, in which they shall form settlements, or of which they shall make actual use. In reality, when navigators have met with desert countries, in which those of other nations have erected some monument to shew their having taken possession of them, they have no farther given themselves any pain about that vain ceremony, than as it proceeded from the regulation of the popes, who divided a great part of the world between the crowns of Castile and Portugal *.

There

* These decrees being of a very singular nature, and hardly any where to be found but in very scarce books, the reader will not be displeased with seeing here an extract of them.

The bull of Alexander VI. by which he gives to Ferdinand and Isabella, king and queen of Castile and Arragon, the New World, discovered by Christopher Columbus.

"*Motu proprio, says the Pope, non ad vestram, vel alterius pro vobis super hoc nobis oblatæ petitionis instantiam, sed de nostra mera liberalitate, & ex certa scientia, ac de apostolicæ potestatis plenitudine, omnes insulas & terras firmas, inventas, & inveniendas, detectas & detegendas versus occidentem & meridiem,*" (drawing a line from one pole to the other, at an hundred leagues to the west of the Azores)

§ 206.
Another manner of possessing the empire of a country.

§ 207.
How a nation appropriates to itself a desert country.

§ 208.
A question on this subject.

§ 209.
If it be permitted to possess a part of a country, in which there are found none but a small number of wandering people.

There is another celebrated question, to which the discovery of the new world has principally given rise. It is asked if a nation may lawfully take possession of a part of a vast country, in which there are found none but erratic nations, incapable, by the smallness of their numbers, to people the whole? We have already observed (§ 81.) in establishing the obligation to cultivate the earth, that these nations cannot exclusively appropriate to themselves more land than they have occasion for, and which they are unable to settle and cultivate. Their removing their habitations through these immense regions, cannot be taken for a true and legal possession; and the people of Europe, too closely pent up, finding land of which these nations are in no particular want, and of which they make no actual and constant use, may lawfully possess it, and establish colonies there. We have already said, that the earth belongs to the human race in general, and was designed to furnish it with subsistence: if each nation had resolved from the beginning, to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. People have not then deviated from the views of nature in confining the Indians within narrower limits. However, we cannot help praising the moderation of the English puritans who first settled in New England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the land they resolved to cultivate *. This laudable example was followed by Mr. William Penn, who planted the colony of quakers in Pennsylvania.

§ 210.
Of colonies.

When a nation takes possession of a distant country, and settles a colony there, that country, though separated from the principal establishment, or mother country, naturally becomes a part of the state, equally with its ancient possessions. Whenever there-

Azores) "auctoritate omnipotentis dei nobis in beato Petro concessa, ac vicariatus Jesu Christi, qua fungimur in terris, cum omnibus illarum dominiis, civitatibus, &c. vobis heredibusque successoribus vestris Castellæ & Legionis regibus in perpetuum tenore presentium donamus, concedimus, assignamus, vosque & heredes ac successores prefatos illorum Dominos cum plena, libera & omnimoda potestate, auctoritate & jurisdictione facimus, constituimus & deputamus." The pope excepts only what might be in the possession of some other Christian prince before the year 1493. As if he had the greatest right to give what belonged to nobody, and especially what was possessed by the American nations; he adds: "Ac quibuscunque personis cujuscunque dignitatis, etiam imperialis & regalis, status, gradus, ordinis, vel conditionis sub excommunicationis latæ sententie penâ, quam eo ipso, si contra fecerint, incurrant, districtius inhibemus ne ad insulas & Terras Firmas inventas & inveniendas, detectas, & detegendas, versus occidentem & meridiem—pro mercibus habendis, vel quavis alia de causa accedere præsumant absque vestra ac hæredum & successorum vestrorum prædictorum licentia speciali, &c. Datum Romæ apud S. Petrum anno 1493, nona Maji, Pontific. nostri anno 1^o." *Leibnitzii Codex Juris Gent. Diplom. 203.*

See *ibid. Diplom. 165.* The bull by which Pope Nicholas V. gave to Alphonso, king of Portugal, and to the infant Henry, the empire of Guinea, and the power of subduing the barbarous nations of those countries, forbidding any other to fail thither, without the permission of Portugal. This act is dated Rome on the 6th of the ideas of January, 1484.

* *History of the English Colonies in North America.*

fore

for the political laws, or treaties, make no distinction between them, every thing said of the territory of a nation ought also to extend to its colonies.

C H A P. XIX.

Of the Country, and the several Things that relate to it.

THE whole of a country possessed by a nation and subject to its laws, forms, as we have already said, its territories; and it is the common country of all the individuals of the nation. We have been obliged to anticipate the definition of the term *our country* (§ 122.) because our subject led us to treat of the love of our country, a virtue extremely excellent and necessary in a state. Supposing then, this definition already known, it remains that we should here explain several things that have a relation to it, and answer the questions that have been made on this subject.

The citizens are the members of the civil society: bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The *natives*, or *indigenes*, are those born in the country of parents who are citizens. Society not being able to subsist, and perpetuate itself, but by the children of the citizens; those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this; in consequence of what it owes to its own preservation; and it is presumed that each citizen, on entering into society, reserves to his children the right of their becoming members. The country of the fathers is then that of the children; and these become true citizens, merely by their tacit consent. We shall soon see, whether on their arriving at the age of reason, they may renounce their right, and what they owe to the society in which they are born. I say that in or order to be in the country, it is necessary that a person be born of a father who is a citizen; for if he is born there of a stranger, it will be only the place of his birth, and not his country.

The inhabitants, as distinguished from citizens, are strangers, who are permitted to settle and stay in the country. Bound by their residence to the society, they are subject to the laws of the state, while they reside there, and they are obliged to defend it, because it grants them protection, though they do not participate in all the rights of citizens. They enjoy only the advantages which the laws, or custom gives them. The *perpetual inhabitants* are those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united, and subject to the society, without participating in all its advantages. Their children follow the condition of their fathers; and as the state has given to these the right of perpetual residence, their right passes to their posterity.

§ 214.
Naturaliza-
tion.

A nation, or the sovereign who represents it, may grant to a stranger, the quality of a citizen, by admitting him into the body of the political society. This is called *naturalization*. There are states in which the sovereign cannot grant to a stranger all the rights of the citizens; for example, that of possessing places of trust, and consequently where he has the power of granting only an imperfect naturalization. It is here a regulation of the fundamental law, which limits the power of the prince. In other states, as in England and Poland, the prince cannot naturalize a single person, without the concurrence of the nation represented by its deputies. In England, however, being born in the country naturalises the children of a foreigner.

§ 215.
Of the chil-
dren of ci-
tizens born
in a foreign
country.

It is asked, whether the children born of citizens in a foreign country, are citizens? The laws have decided this question in several countries, and it is necessary to follow their regulations. By the law of nature alone, children follow the condition of their fathers, and enter into all their rights (§ 212.); the place of birth produces no change in this particular, and cannot of itself furnish any reason from taking for a child what nature has given him; I say of itself, for the civil law, or politics, may order otherwise, from particular views. But I suppose that the father has not entirely quitted his country in order to settle elsewhere. If he has fixed his abode in a foreign country, he is become the member of another society, at least as a perpetual inhabitant, and his children are so too.

§ 216.
Of children
born at sea.

As to the children born at sea; if they are born in those parts of it that are possessed by the nation, they are born in the country: if it is in the open sea, there is no reason to distinguish them from those who are born in the country; for it is not naturally the place of birth that gives rights, but extraction: and if the children are born in a vessel belonging to the nation, they may be reputed born in its territories; for it is natural to consider the vessels of a nation as parts of its territory, especially when they sail upon a free sea, since the state preserves its jurisdiction in these vessels. And as, according to the commonly received custom, this jurisdiction is preserved over the vessels, even in parts of the sea subject to a foreign dominion, all the children born in the vessels of a nation, are considered as born in its territory. By the same reason those born in a foreign vessel, are reputed born in a foreign country, at least if it is not in the very part of the nation; for the part is more particularly the territory, and the mother, by being at that moment in a foreign vessel, is not out of the country. I suppose that she and her husband have not quitted the country to settle elsewhere.

§ 217.
Of the chil-
dren born
in the ar-
mies of the
state, or in
the house of
its minister
at a foreign
court.

It is from the same reasons that the children born out of the country in the armies of the state, or in the house of its minister at a foreign court, are reputed born in the country; for a citizen absent from his family on the service of the state, and who lives under its dependence and jurisdiction, cannot be considered as being gone out of its territory.

The

The *domicil* is the habitation fixed in any place with an intention of always staying there. A man does not then establish his domicil in any place, unless he makes sufficiently known his intention of fixing there, either tacitly or by an express declaration. However, this declaration is no reason why, if he afterwards changes his mind, he may not remove his domicil elsewhere. In this sense, he who stops, even for a long time, in a place, for the management of his affairs, has only a simple habitation there, but has no domicil. Thus the envoy of a foreign prince has not his domicil at the court where he resides. § 218.
Of the domicil.

The *natural or original domicil*, is that given us by birth, where our father had his; and we are considered as retaining it, till we have abandoned it, in order to chuse another. The *domicil acquired (adscititium)* is that where we settle by our own choice.

Vagabonds are people who have no domicil. Consequently those born of vagabond parents have no country, since a man's country is the place, where at the time of his birth, his parents had their domicil (§ 122.), or it is the state of which his father was then a member: which comes to the same point, for to settle for ever in a nation, is to become a member of it, at least as a perpetual inhabitant, if he has not all the privileges of a citizen. However we may consider the country of a vagabond to be that of his child, while that vagabond is considered as not having absolutely renounced his natural or original domicil. § 219.
Of vagabonds.

Many distinctions will be necessary in order to give a complete solution to the celebrated question, whether a man may quit his country or the society of which he is a member? § 220.
If a person may quit his country. 1. The children have a natural attachment to the society in which they are born: being obliged to acknowledge the protection it has granted to their fathers, they are obliged to it, in a great measure for their birth and education. They ought then to love it, as we have already shewn (§ 122.), express a just gratitude to it, and as much as possible return benefit for benefit. We have just observed (§ 122.) that they have a right to enter into the society of which their fathers were members. But every man born free; the son of a citizen, arrived at years of discretion, may examine whether it be convenient for him to join in the society for which he was destined by his birth. If he finds that it will be of no advantage to him to remain in it, he is at liberty to leave it, making a return for what it has done in his favour*, and preserving, as much as his new engagements will allow him, the sentiments of love and gratitude he owes it. Moreover a man's obligations to his natural country may change, lessen, or entirely vanish, according as he shall have quitted it lawfully, and with good reason, in order to chuse another, or has been driven from it meritoriously, or contrary to justice, in due form of law, or by violence.

2. As soon as the child of a citizen arrives at manhood, and

* This is the foundation of the customs paid by foreigners.

acts as a citizen, he tacitly assumes that character; his obligations, like those of others who enter expressly and in due form into engagements with society, become stronger and more extensive: but the case is very different with respect to him of whom we have been speaking. When a society has not been contracted for a determinate time, it is allowable to quit it, when that separation can be of no detriment to the society. A citizen may then quit the state of which he is a member, provided it be not in such a conjuncture, when he cannot abandon it without doing it a remarkable prejudice. But we must here distinguish what may be done according to the rigour of right, from what is honest and conformable to every duty; and, in a word, the *internal* from the *external* obligation. Every man has a right to quit his country, in order to settle in any other, when by that step he does not expose the welfare of his country. But a good citizen will never resolve to do it without necessity, or without very strong reasons. There is but little honesty in abusing our liberty, by quitting our associates upon slight pretences, after having drawn considerable advantages from them, and this is the case of every citizen with respect to his country.

3. As to those who have the cowardice to abandon it in a time of danger, seeking to secure themselves instead of defending it; they manifestly violate the pact of society, by which they engaged to defend themselves in an united body, and in concert: these are infamous deserters which the state has a right to punish severely.

§ 221. In a time of peace and tranquillity, when the country has no real need of all her children, the welfare even of the state and that of the citizens, requires that any of them may travel for the management of their own affairs, provided that they be always ready to return, as soon as the public interest recalls them. It is not presumed that any man has engaged towards the society of which he is a member, never to leave the country when the welfare of his affairs require it, and when he can absent himself without injury to his country.

§ 222. The political laws of nations vary greatly in this respect. Among some all citizens are constantly permitted to absent themselves, except in the case of an actual war, and even to quit the country entirely when they think proper, without alledging any reason for it. This licence, is in its own nature contrary to the welfare and safety of the society, and can no where be tolerated, but in a country without resources incapable of supplying the wants of its inhabitants. In such a country there can only be an imperfect society; for it is necessary that the civil society should be able to place the members in a condition to procure by their labour and industry all the necessaries of life: without which it has no right to require them to devote themselves entirely to it. In other states, every one may freely travel for the management of his affairs, but not entirely leave the country without the express permission of the sovereign. In short, there are others where

How a person may absent himself for a time.

The variation of the political laws in this respect. These must be obeyed.

where the rigour of the government will not permit any one whatsoever to leave his country, without passports in form, which are even not granted without great difficulty. In all these cases it is necessary to conform to the laws, when they are made by a lawful authority. But in the last, the sovereign abuses his power, and reduces his subjects to an insupportable slavery, if he refuses them the permission of leaving his dominions for their own advantage, when he might grant it them without inconvenience or danger to the state. We are going even to shew, that on certain occasions, he cannot detain, on any pretence whatsoever, those who would go in order never to return.

There are cases in which a citizen has an absolute right to renounce his country, and abandon it entirely. 1. If the citizen cannot procure subsistence in his own country, he is doubtless permitted to seek it in another. For the political or civil society being entered into only with a view of facilitating to each the means of living in happiness and safety, it would be absurd to pretend that a member, whom it cannot furnish with such things as are most necessary, has not a right to leave it.

§ 223.
Cases in which a citizen has a right to quit the country.

2. If the body of the society, or he who represents it, absolutely neglects to fulfil his obligations to a citizen, he may retire. For if one of the contracting parties does not observe his engagements, the other is no longer bound to fulfil his. The contract is reciprocal between the society and its members; and on this foundation, the society may also expel a member who violates its laws.

3. If the major part of the nation, or the sovereign who represents it, would establish laws, on things to which the pact of society cannot oblige a citizen to submit, those who are averse to these laws have a right to quit the society, in order to enter into another. For instance, if the sovereign, or the greatest part of the nation, will permit the exercise of only one religion in the state, those who believe and profess another religion have a right to retire, and to take with them their families or effects. For they never could subject themselves to the authority of men, in affairs of conscience*; and if the society suffers, and is weakened by their departure, the blame ought to be laid on its want of toleration: these are the last who break the pact of society, and force the others to separate from it. We have elsewhere touched upon some other examples of this third case: that of a popular state, which is resolved to have a sovereign (§ 33.), and that of an independent nation, taking the resolution to submit to a foreign power (§ 195.)

Those who quit the country from a lawful reason, with a design to settle elsewhere, are called *emigrants*, and take their families and fortunes with them.

§ 224.
Of emigrants.

The right of emigration may arise from several sources. 1. The

§ 225.
Sources of their right.

* See the above chapter on religion.

case we have just mentioned (§ 223.); this is a natural right, which is certainly excepted in the pact of association.

2. The emigration may, in certain cases, be secured to the citizens by a fundamental law of the state. The citizens of Neufchatel and Valengin, in Switzerland, may quit the country and carry off their effects in what manner they please, without paying any duties.

3. It may be voluntarily granted them by the sovereign.

4. In short, this privilege may arise from some treaty made with a foreign power, by which a sovereign has promised to leave full liberty to those of his subjects, who for a certain reason, on account of religion for instance, desire to transplant themselves into the territories of that power. There are such treaties between the German princes in particular, with respect to religion. There are also the same in Switzerland; a citizen of Bern may if he pleases remove to Fribourg, and reciprocally a citizen of Fribourg may go and settle at Bern, in order to profess the religion of the country, and he has a right to take all his effects with him.

It appears from several historical facts, particularly in the history of Switzerland and the neighbouring countries, that the law of nations, established there by custom for some ages past, does not permit a state to receive the subjects of another state into the number of its citizens. This vicious custom had no other foundation than the slavery to which the people were then reduced. A prince, a lord, considered his subjects in the rank of his property and riches, he calculated their number as he did his flocks; and to the disgrace of human nature, this strange abuse is not yet every where destroyed.

If the sovereign attempts to stop those who have the right of emigration, he does them an injury, and this people may lawfully implore the protection of the power who would receive them. Thus we have seen Frederic William, king of Prussia, grant his protection to the emigrant protestants of Saltzburgh.

The name of *supplicants* is given to all the fugitives who implore the protection of a sovereign, against the nation or prince they have quitted. We cannot solidly establish what the law of nations has determined on their account, before we have treated of the duties of one nation towards others.

In fine, *exile* is another manner of leaving our country. An *exile* is a man driven from the place of his domicil, or constrained to leave it, but without a mark of infamy. Banishment is like expulsion, with a mark of infamy*. Both may be for a limited time, or for ever. If an exile or banished man resided in his own

* The customs of mankind do not oppose the sense we have given to these two terms. The French academy says: "Banishment is only used in consequence of a sentence passed in a court of justice, and exile, is only the being sent on account of some disgrace at court." Thus such a condemnation inflicted by justice is infamous; and that proceeding from having offended the court is not usually so.

country, he is exiled or banished from his country. It is however proper to observe, that it is commonly customary also to apply the terms of exile and banishment to the expulsion of a stranger out of the country where he had not his domicil, with an express prohibition of his ever returning.

A man may be deprived of any right whatsoever by way of punishment, therefore exile, which deprives him of the right of dwelling in a certain place, may be considered as a punishment: banishment is always one; for a mark of infamy cannot be set on any one, but with the view of punishing him for a fault, either real, or pretended.

When the society has excluded one of its members by a perpetual banishment, he is only banished from the lands of that society, and it cannot hinder him from living wherever else he pleases, for after having driven him out, it can have no authority over him. However, the direct contrary may take place by particular conventions between two or more states. Thus every member of the Helvetic confederacy may banish its own subjects out of the territories of Switzerland; upon which the banished man would not be allowed to live in any of the cantons, or in the territories of their allies.

Exile is divided into *voluntary* and *involuntary*. It is voluntary, when a man quits his domicil, to escape some punishment, or to avoid some calamity; and involuntary, when it is the effect of a superior order.

Sometimes an exile is prescribed the place where he is to remain during his exile; or a certain space is mentioned which he is forbid to enter. These various circumstances and modifications depend on him who has the power of sending him into exile.

A man, by being exiled or banished, does not lose his quality as a man, and consequently his right to dwell on any other part of the earth. He derives this right from nature, or rather from its author, who has appointed the earth for the habitation of mankind; and the introduction of property could not prejudice the right which all men receive by birth to the use of such things as are absolutely necessary. § 229. The exile and banished man have a right to live elsewhere.

But though this right is necessary and perfect in the general view of it, it must be observed, that it is but imperfect in regard to each particular country. For every nation has a right of refusing to admit a stranger into the country, when he cannot enter it, without putting it in evident danger, or without doing it a remarkable prejudice. What it owes to itself, the care of its own safety, gives it this right; and in virtue of its natural liberty, the nation is to judge, whether it is, or is not in a proper situation to receive this stranger (Prelim. § 16.) He cannot then settle by a full right, and as he pleases, in the place he has chosen; but he ought to demand the permission of doing it of the superior of the place; and if it is refused, it is his place to submit. § 220. The nature of this right.

However, as property could not be introduced to the prejudice of the right acquired by every human creature, of not being absolutely § 221. The duty of nations towards them.

solutely deprived of such things as are necessary; no nation can refuse, without good reasons, even the perpetual residence of a man driven from his country. But if particular and solid reasons, hinder it giving him an asylum, this man has no longer any right to demand it; because in such a case, the country inhabited by the nation cannot, at the same time, serve for its own use, and that of this stranger. Now, even supposing that things are still in common, nobody can arrogate to himself the use of a thing which actually serves to supply the wants of another. Thus a nation, whose lands are scarcely sufficient to supply the wants of the citizens, is not obliged to receive a company of fugitives or exiles. Therefore it ought absolutely to reject them, as much as if they were infected by a contagious disease. Thus it has a right to send them elsewhere, if it has just cause to fear, that they will corrupt the manners of the citizens; that they will create religious disturbances, or occasion some other disorder, contrary to the public safety. In a word, it has a right, and is even obliged in this respect, to follow the rules which prudence dictates. But this prudence ought not be contracted and gloomy; it should not be carried so far as to refuse a retreat to the unfortunate for slight reasons and on groundless and frivolous fears. The means of tempering it will be never to lose sight of that charity and commiseration which are due to the unhappy. We cannot refuse these sensations even to those who have fallen into misfortunes through their own fault. For we ~~ought~~ to hate the crime, and to love the criminal, since all mankind ought to love each other.

§ 232.
A nation
cannot pu-
nish faults
committed
out of its
territories.

§ 233.
If the public
security of
the human
race is not
concerned.

If an exile or banished man is driven from his country for any crime, it does not belong to the nation in which he has taken refuge, to punish him for a fault committed in a foreign country. For nature gives to mankind, and to nations, the right of punishing, only for their defence and safety (§ 169.); whence it follows, that he can only be punished by those he has offended.

But this reason shews, that if the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule, the villains who, by the quality and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundations of their common safety. Thus pirates are brought to the gibbet by the first into whose hands they fall. If the sovereign of the country where crimes of that nature have been committed, reclaims the authors of them, in order to bring them to punishment, they ought to be restored to him, as to one who is principally interested in punishing them in an exemplary manner. And it being proper to convict the guilty, and to try them according to some form of law, this is a second reason why malefactors are usually

usually delivered up at the desire of the state where their crimes have been committed.

C H A P. XX.

Of public, common, and private Property.

LET us now see of what nature are the different things included in a country possessed by a nation, and endeavour to establish the general principles of the law by which they are regulated. This subject is treated by civilians under the title of *de rerum divisione*. There are things which in their own nature cannot be possessed; there are others, the property of which nobody can attribute to himself, and that remain common, when a nation takes possession of a country: the Roman civilians called these things *res communes*, things common: such were, among them, the air, the running-water, the sea, the fish, and the wild beasts.

§ 234.
Of what the
Romans
called *res
communes*.

Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the intire mass of its wealth. But the nation does not possess all these benefits in the same manner. Those not divided between particular communities, or among the individuals of a nation, are called *public property*. Some are reserved for the necessities of the state, and form a domain of the crown, or of the republic; and others remain common to all the citizens, who take advantage of them, each according to his necessities, or according to the laws which regulate their use, and these are called *common property*. There are others that belong to some body or community, termed *common property*, *res universitatis*; and these are with respect to this body in particular, what the public property is with respect to the whole nation. As the nation may be considered as a great community, we may indifferently call *things in common*, those that belong to it in common, in such a manner that all the citizens may make use of them, and those that are possessed in the same manner by a body or community: the same rules take place with respect to each. In short, the goods possessed by individuals are termed *private property*, *res singulorum*.

§ 235.
The entire
wealth of a
nation and
its divisions.

When a nation, in a body, takes possession of a country, every thing that is not divided among its members remains common to the whole nation, and is called *public wealth*. There is a second way whereby a nation, and in general, every community may acquire wealth, by the will of whosoever thinks proper to convey to it, under any title whatsoever, the domain, or the property of what he possesses.

§ 236.
Two ways
of acquiring
public
property.

As soon as the nation commits the reins of government into the hands of a prince, it is considered as committing to him, at the same time, the means of governing. Since then the revenues produced by the public property, the domain of the state, is

§ 237.
The revenues of the
public property are
def-naturally

the sovereign's disposal.

destined for the support of government; it is naturally at the prince's disposal, and ought always to be considered in this light, unless the nation has, in express terms, excepted it in conferring the supreme authority, and has provided in any other manner for the necessary expences of the state, and the support of the prince's person and household. Whenever then the sovereign authority is referred merely and simply to the prince, it includes along with it the power of disposing freely of the public revenues. The duty of the sovereign strictly obliges him to apply these revenues only to the necessities of the state; but he alone is to determine the proper application of them, and ought not to be accountable for them to any person.

§ 238.
The nation may grant him the use and property of the common goods.

The nation may invest the superior with the sole use of its common goods, and thus add it to the domain of the state. It may even cede the property of them to him. But this cession of the use, or property, requires an express act of the proprietor, which is the nation. It is difficult to found it on a tacit consent, because fear too often hinders subjects from exclaiming against the unjust enterprises of the sovereign.

§ 239.
It may allow him the domain and reserve the use of it.

The people may even allow the superior, the domain of the things he possesses in common, and reserve to itself the use of them in the whole or in part. Thus the domain of a river may be ceded to the prince, while the people reserve the use of it for navigation, fishing, the watering of cattle, &c. They may also allow the prince the sole right of fishing, &c. in a river. In a word, the people may cede to the superior what right they please with respect to the common goods of the nation; but all these rights do not naturally and of themselves flow from the sovereignty.

§ 240.
Of taxes.

If the revenues produced by the public goods, or the domain, are not sufficient for the public wants, the state may supply the deficiency by taxes. These ought to be regulated in such a manner, that all the citizens may pay their quota in proportion to their abilities; and the advantages they reap from the society. All the members of the civil society being equally obliged to contribute, according to their abilities, to its advantage and safety; they cannot refuse to furnish the subsidies necessary to its preservation, when they are exacted by a lawful power.

§ 241.
The nation may reserve to itself the right of establishing them.

Many nations have been unwilling to commit to the prince a trust of so delicate a nature, and to grant him a power that he may so easily abuse. In establishing a domain for the support of the sovereign and the ordinary expences of the state, they have reserved to themselves the right of providing, by themselves, or by their representatives, for extraordinary wants, in imposing taxes payable by all the inhabitants. In England, the king lays the necessities of the state before the parliament; that representative body of the nation deliberates, and with the concurrence of the king, appoints the sum to be raised, and the manner of raising it. And to this body, the prince gives an account of the use he makes of it.

In

In other states where the sovereign possesses the full and absolute authority, he alone establishes the taxes, regulates the manner of raising them, and makes use of them as he thinks proper, without giving an account to any body. The French king at present enjoys this authority, with the mere form of causing his edicts to be confirmed in parliament: but that body has a right to make humble remonstrances, if any inconveniences are found in the imposition ordered by the prince: a very wise establishment for causing truth and the cries of the people to reach the ears of the sovereign, and for setting some bounds to his dissipation, or the avidity of the ministers and persons concerned in the revenue.

§ 243.
Of the sovereign who has this power.

The prince who is invested with the power of taxing his people, ought to take care of considering the money he raises as his own property. He ought never to lose sight of the end for which this power was granted him: the nation was willing to enable him to provide, as it should seem best to his wisdom, for the necessities of the state. If he diverts the money to other uses, if he consumes it in idle luxury, to gratify his pleasures, to satiate the avarice of his mistresses and favourites, we dare tell those sovereigns who are still capable of hearing truth, that such a one is not less guilty, nay, that he is a thousand times more so than a private person who makes use of another person's fortune to gratify his irregular passions. Injustice is not the less shameful for being above punishment.

§ 243.
The duties of the prince with respect to taxes.

Every thing in the political society ought to tend to the good of the community; and if even the citizen's person is subject to this rule, their fortunes cannot be excepted. The state cannot subsist, or constantly administer public affairs in the most advantageous manner, if it has not the power of disposing, on occasion, of all kinds of goods subject to its authority. It may even be presumed, that when the nation takes possession of a country, the property of certain things is allowed to individuals only with this reserve. The right which belonged to the society or to the sovereign, of disposing, in case of necessity and for the public safety, of all the wealth contained in the state is called the *eminent domain*. It is evident that this right is, in certain cases, necessary to him who governs, and consequently is a part of the empire or sovereign power, and ought to be placed in the number of the prerogatives of majesty (§ 45.) When therefore the people submit the empire to any one, it at the same time yields to him the *eminent domain*, at least if it is not expressly reserved. Every prince who is truly a sovereign, is invested with this right, in such a manner that his authority is limited in other respects.

§ 244.
Of the eminent domain affixed to sovereignty.

If the nation disposes of the *public property* in virtue of his eminent domain, the alienation is valid, as having been made with a sufficient power.

When he disposes in like manner, in a case of necessity, of the possessions of a community, or an individual, the alienation will

be valid, for the same reason. But justice demands that this community, or this individual, be recompensed out of the public money: and if the treasury is not able to pay it, all the citizens are obliged to contribute to it; for the expences of the state ought to be supported equally, or in a just proportion. It is in this as in the throwing of merchandize overboard to save the vessel.

§ 245.
Of the government with respect to public property.

Besides the *eminent domain*, the sovereignty gives a right of another nature over all public, common, and private goods; that is the empire, or the right of command in all the places of the country belonging to the nation. The supreme power extends to every thing that passes in the state, wherever it is transacted, and consequently the sovereign commands in all public places, on rivers, highways, deserts, &c. Every thing that happens there is subject to his authority.

§ 246.
The superior may make laws with respect to the use of things possessed in common.

In virtue of the same authority, the sovereign may make laws regulating the manner in which common goods are to be used, as well those of the entire nation, as those of distinct bodies or communities. He cannot, indeed, deprive those of their right who have a share in these goods, but the care he ought to take of the public repose, and the common advantage of the citizens, gives him doubtless a right to establish laws tending to this end, and consequently, to regulate the manner in which things possessed in common ought to be enjoyed. This affair may give room for abuse, and excite troubles, which it concerns the state to prevent, and against which the prince is obliged to take just measures. Thus the sovereign may establish wise laws with respect to hunting and fishing; forbid them in the reasons of propagation; prohibit the use of certain nets, and of every destructive method, &c. But as the sovereign has a right to make these laws only in the character of the common father, governor, and tutor of his people, he ought never to forget the end which called him to it, and if he in this respect makes laws with any other view than that of the public welfare, he abuses his power.

§ 247.
Of the alienation of the goods of a community.

A community, as well as every proprietor, has the right of alienating and mortgaging its property, but the present members have never a right to lose sight of the design of these common goods, nor to dispose of them otherwise than for the advantage of the body, or in cases of necessity. If they alienate them with any other view, they abuse their power, and sin against their duty of the community, and their posterity; and the prince in quality of common father, has a right to oppose them. Besides, the interest of the state demands that the property of the community be not dissipated; which gives the prince, intrusted with the care of watching over the public safety, a new right to hinder the alienation of this property. It is then very proper to ordain in a state, that the alienation of the property of communities should be invalid, without the consent of the prince. Thus the civil law, in this respect, gives to communities the rights of minors.

But this is strictly no more than a civil law; and the opinion of

of those, who in the law of nature, take from a community the power of alienating their property without the consent of the sovereign, appears to me to be void of foundation, and contrary to the notion of property. 'Tis true that a community may have received property either from their predecessors, or from any other persons, with a clause that disables them from alienating it: but in this case it is only a perpetual usufructuary, and not an entire and free property. If any of their property was solely given for the preservation of the body; 'tis evident that the community has not a right to alienate it, except in a case of extreme necessity.

All the members of a community have an equal right to the use of their common property. But the body of the community may make such regulations on the manner of enjoying it as they think proper, provided that these regulations are not inconsistent with that equality which ought to be preserved in a community of property. Thus a community may determine the customs of a common forest or pasture, either in allowing it to all the members according to their wants, or in fixing an equal proportion for each; but they have not a right to exclude any one, or to distinguish him by assigning him a less share than that of the others.

§ 248.
Of the use
of common
property.

All the members of a body having an equal right to their common property, each ought to have the profit of it in a manner that does not injure in any manner the common use. According to this rule, an individual is not permitted to form upon any river that is a public benefit, any work capable of rendering it less proper for the use of every one else, as erecting mills, making a trench to turn the water from the bed, &c. If he attempts it, he arrogates to himself a particular right, contrary to the common right of all.

§ 249.
The man-
ner in
which each
ought to
enjoy it.

The right of *prevention* (*jus præventionis*) ought to be faithfully observed in the use of common things that cannot serve at the same time for many. By this term we understand the right of him who first comes to the use of this sort of things. For example, if I actually draw water from a common or public well, another who comes after, cannot drive me away to draw out of it himself, and he ought to stay till I have done. For I make use of my right in drawing that water, and nobody can disturb me: a second, who has an equal right, cannot make use of it to the prejudice of mine; to make me have done, by his arrival, would be to attribute to himself a greater right than me, and thereby to offend against the law of equality.

§ 250.
Of the right
of preven-
tion in their
use.

The same rule ought to be observed in regard to those common things that are consumed in using, and a second, who comes after, has no right to take them from him. I repair to a common forest, and begin to fell a tree: you come, and insist upon having the same tree: you cannot take it from me; for this would be to arrogate to yourself a right superior to mine, though our rights are equal. This rule, the law of nature prescribed in

§ 251.
Of the same
right in
other cases.

the

the use of the productions of the earth, before the introduction of property.

§ 252.
Of the preservation and reparation of things in common.

The expences necessary for the preservation or reparation of the things that belong to the public, or to a community, ought to be equally supported by all who have a share in them, whether the money be drawn from a common chest, or whether each individual contributes his quota. The nation, the community, and any collective body in general, may also establish extraordinary taxes, imposts, or annual contributions to defray these expences; provided that they are attended with no vexations, and that the money exacted, be faithfully applied to the use for which it was raised. To this end also, as we have observed (§ 103.), the rights of toll are lawfully established. Highways, bridges, and causeways are things of a public nature, from which all who pass over them receive advantage: it is therefore just that all these passengers contribute to their support.

§ 253.
The duty and right of a sovereign in this respect.

We shall see presently, that the sovereign ought to provide for the preservation of things of a public nature. He is not less obliged, as the conductor of the whole nation, to watch over the property of a community. It is for the interest of every state that a community does not fall into indigence, by the ill conduct of those who actually compose it. And as the obligation produces the right, without which it cannot be discharged, the sovereign has here a right to oblige the community to conform to their duty. If then he perceives, for example, that they suffer the necessary buildings to fall to ruin, or that they destroy the forests, he has a right to prescribe what they ought to do, and to put his orders in force.

§ 254.
Of private property.

We have only one word to say, with respect to private property: every proprietor has a right to make what use he pleases of his own substance, and to dispose of it in such a manner as he pleases, when the property of a third person is not injured by it. However, the sovereign, as the father of his people, may, and ought to set bounds to a prodigal, and to prevent his running to ruin, especially if this prodigal is the father of a family. But he must take care not to extend this right of inspection so far as to offer restraint to his subjects in the administration of their affairs, which would be of no less injury to the true welfare of the state, than to the just liberty of the citizens. The particulars of this subject belong to the public law and to politics.

§ 255.
The sovereign may submit them to political laws.

It must also be observed, that individuals are not so free in the oeconomy or government of their affairs, as not to be subject to the regulations of polity, made by the sovereign. For instance, if vines are greatly multiplied in a country, which is in want of corn, the sovereign may forbid the planting of the vine in fields proper for tillage, for here the public welfare and the safety of the state are concerned. When a reason of such importance requires it, the sovereign, or the magistrate, may oblige an individual to sell all the provisions that are more than sufficient for the subsistence of his family, and fix the price. The public authority may and ought

ought to hinder monopolies, and suppress all practices tending to raise the price of provisions; this the Romans called *annonam incrementare, comprimere, vexare*.

Every man may naturally chuse the person to whom he would leave his wealth after his death, as long as his right is not limited by an indispensable obligation; as for instance, that of providing for the subsistence of his children. These children have also naturally the right of succeeding in an equal proportion to the property of their father. But this is no reason why particular laws may not be established in a state, with respect to testaments and inheritances; a respect being always paid to the essential laws of nature. Thus to support noble families, it is a law established in many places, that the eldest has the right of being the principal heir to his father. Lands perpetually appropriated to the eldest of a family belong to him, in virtue of another right, which has its source in the will of him, who being the possessor of these lands, has bequeathed them in that manner.

§ 256.
Of inheritances.

C H A P. XXI.

Of the Alienation of the public Property, or the Domain, and that of a Part of the State.

THE nation being the sole mistress of the property in its possession, may dispose of it as she thinks proper, alienate it, or lawfully mortgage it. This right is a necessary consequence of the full and absolute domain: the exercise of it is restrained by the law of nature, only with respect to proprietors who have not the use of reason necessary for the management of their affairs, which is not the case of a nation. Those who think otherwise, cannot alledge any solid reason for their opinion; and it follows from their principles, that no safe contract can be entered into with any nation: which attacks the foundation of all public treaties.

§ 257.
The nation may alienate its public property.

But it is very just to say, that the nation ought to preserve its public property with great care, to make a proper use of it, and not to dispose of it but for good reasons, nor to alienate or mortgage it for its manifest advantage, or in case of a pressing necessity.

§ 258.
The duties of a nation in this respect.

This is an evident consequence of the duties a nation owes to itself. The public property is of great use, and even necessary, and it cannot dissipate it improperly, without manifestly hurting and injuring itself. I speak of the public property, strictly so called, or the domain of the state. Alienating its revenues is cutting the nerves of government. As to the property common to all the citizens, the nation does an injury to those who receive advantage from it, if it alienates it without necessity, or without good reason. It has a right to do this as proprietor of these possessions; but it ought to do it only in such a manner as is agreeable to the duties of the body towards its members.

These

§ 259.
Those of
the prince.

These duties relate to the prince, the director of the nation : he ought to watch over its preservation, and the wise administration of the public property, to stop and prevent its dissipation, and not to suffer its being diverted to foreign uses.

§ 260.
He cannot
alienate the
public prop-
erty.

The prince, or the superior of the society, whatever he is, being naturally no more than the administrator, and not the proprietor of the state, his authority as sovereign or head of the nation, does not of itself give him a right to alienate or dispose of the public property. The general rule then is, that the superior cannot dispose of the public property, as to its substance. If the superior makes use of this property, the alienation he makes of it will be invalid, and may at any time be revoked by his successor, or by the nation. This is the law commonly received in France ; and it was upon this principle that the duke of Sully * advised Henry IV. to resume the possession of all the domains of the crown alienated by his predecessors.

§ 261.
The nation
may give
him the
right of
doing it.

The nation having the free disposal of all the property belonging to it (§ 257.) ; it may convey this right to the sovereign, and consequently confer upon him that of alienating, and mortgaging the public property. But this right not necessarily belonging to the conductor of the state, to enable him to render the people happy by his government ; it is not to be presumed, that the nation has given it him ; and if it has not made an express law for that purpose, it ought to be maintained that the prince is not invested with it.

§ 262.
The rules
on this sub-
ject with re-
spect to
treaties be-
tween na-
tion and
nation.

The rules we have just established, relate to alienations of public property made in favour of individuals. The question is altered when it relates to alienations made by one nation to another † : it requires other principles to decide it in the different cases that may present themselves. Let us endeavour to give a general theory of them.

1. It is necessary that nations should treat and transact their affairs with validity, without which they could not have no method of terminating them, and of placing themselves in a state of tranquillity. Whence it follows, that when a nation has ceded any part of its property to another, the cession ought to be held as valid and irrevocable, as it is done in virtue of the notion of *property*. This principle cannot be shaken by any fundamental law, by means of which a nation might pretend to deprive itself of the power of alienating what belonged to itself. For this would be to forbid all contracts with other nations, or to pretend to deceive them. A nation with such a law ought never to treat of its property ; if it is obliged to it by necessity, or determined to do it for its own advantage, it must renounce its fundamental law. It is seldom disputed, that an entire nation may alienate what belongs to itself : but it is asked, if its conductor, if its sovereign, has this power ? The question may be determined by the fundamental

* See his Memoirs.

† Quod domania regnorum inalienabilia & semper revocabilia dicuntur, id respectu privatorum intelligitur ; nam contra alias gentes divino privilegio opus foret. *Leutinius, Proleg. ad Codic. Jur. Gent. Diplom.*

laws, If the laws say nothing directly on this subject, This will be explained in our second principle.

2. If the nation has conferred the full sovereignty on its conductor, if it has committed the care of it to him, and has, without reserve, given him the right of treating and contracting with other states, it is considered as having invested him with all the power necessary to make a valid contract. The prince is then the organ of the nation; what he does is reputed done by itself, and though he is not the proprietor of the public property, his alienations are valid, as being duly authorized.

The question becomes more difficult, when it relates, not to the alienation of some parts of the public property, but to the dismembering of the nation or state itself, the cession of a town or a province, that composes a part of it. This must ever result from invariable principles. A nation ought to preserve itself (§ 16.), it ought to preserve all its members, it cannot abandon them, and it is under an obligation to them of maintaining them in the rank of members of the nation (§ 17.) It has not then a right to traffic with their rank and liberty, on account of any advantages it may promise itself from such a negotiation. They are united to the society to be its members; they acknowledge the authority of the state, to promote in concert their common welfare and safety, and not to be at its disposal, like a farm or an herd of cattle. But the nation may lawfully abandon them in a case of extreme necessity, and it has right to cut them off from the body, if the public safety requires it. When therefore in such a case, the state abandons a city or a province, to a neighbour, or to a powerful enemy, the cession ought to remain valid as to the state, since it hath a right to make it: it could take no other method; it has yielded all the other rights it could have over it.

But this province, or this city, thus abandoned and dismembered from the state, is not obliged to receive the new master attempted to be given them: the people being separated from the society of which they were members, they resume all their rights, and if it be possible for them to defend their liberty against him who would subject them to his authority, they may lawfully resist him. Francis I. having engaged by the treaty of Madrid to cede the duchy of Burgundy to the emperor Charles V. the states of that province declared, "that having never been subject to any other crown but that of France, they would die subject to it; and that if the king abandoned them, they would take up arms, and endeavour to set themselves at liberty, rather than submit to another power *." 'Tis true, subjects are seldom in a situation to make resistance on these occasions, and commonly the best part they are able to take, is to submit to their new master, by obtaining as good conditions as possible.

The prince, the superior of whatever kind, has he the power to dismember the state? Let us answer as we have done above with

§ 263.
Of the alienation of a part of the state.

§ 264.
The right of those dismembered.

§ 265.
Whether the prince has power to dismember the state.

* *Memoirs of France, Tom. II. p. 453.*

respect

respect to the domain : if the fundamental laws forbid the dismembering, he cannot do it without the concurrence of the nation or its representatives. But if the laws are silent, and if the prince has received a full and absolute authority, he is then the depositary of the rights of the nation, and the organ by which it declares its will. The nation ought never to abandon its members but in a case of necessity, or with a view to the public safety, and to preserve itself from total ruin : and the prince ought only to cede them for the same reasons. But since he has received an absolute authority, he is to judge of the necessity of the case, and what the safety of the state requires.

On occasion of the treaty of Madrid, just mentioned, the principal persons in France assembled at Cognac, after the king's return, unanimously concluded, "that this authority did not extend "so far as to dismember the crown ;" and the treaty was declared void, as contrary to the fundamental law of the kingdom. Indeed it was done without sufficient power ; the law in express terms refusing the king the right of dismembering the kingdom : the concurrence of the nation was necessary for this purpose, and it might give its consent by the medium of the states-general. Charles V. ought not to have released his prisoner before those very states had approved the treaty ; or rather, making a more generous use of his victory, he should have imposed less rigorous conditions, such as it was in the power of Francis I. to grant, and with which he could not have refused to comply without shame. But at present, when the states-general do not assemble in France, the king remains the sole organ of the state, with respect to other powers : they have a right to take his will for that of all France, and the cessions the king might make them, would remain valid, in virtue of the tacit consent by which the nation has submitted all power into the hands of the king with respect to treaties. Were it otherwise, no certain treaty could be entered into with the crown of France. However, by way of precaution, other powers have often demanded that their treaties should be registered in the parliament of Paris : but at present this formality seems to be laid aside.

C H A P. XXII.

Of Rivers, Streams and Lakes.

§ 266.
Of a river
that separates two
territories.

WHEN a nation takes possession of a country, in order to settle there, it possesses every thing included in it, as lands, lakes, rivers, &c. But it may happen, that the country is terminated and separated from another by a river, in which case it is asked, to whom this river belongs ? It is manifest from the principles established in Chap. XVIII. that it ought to belong to the nation who first took possession of it. This principle cannot be denied ; but the difficulty is, to make the application. It is not

easy

easy to determine which of the two neighbouring nations was the first who took possession of a river that separates them. These are the rules which the principles of the law of nations furnish for deciding these questions.

1. When a nation takes possession of a country terminated by a river, it is considered as also appropriating the river to itself; for a river is of such great use, that it is to be presumed, the nation intended to reserve it to itself. Consequently the nation who first established its dominion on one of the banks of the river, is considered as being the first possessor of all that part of the river which terminates its territory. This presumption is indubitable, when it relates to a river that is extremely large, at least for a part of its length; and the strength of the presumption increases or diminishes in an *inverse ratio* with the largeness of the river; for the more the river is confined, the more does the safety and convenience of its use require that it should be subject entirely to the empire and property of that nation.

2. If this nation has made any use of the river, as for navigation or fishing, it is presumed with the greater certainty, that it has resolved to appropriate the river to itself.

3. If neither the one nor the other of the two nations near the river can prove that it settled first in those countries, it is to be supposed that they both came there at the same time, since neither of them can give any reason of preference: and in this case, the dominion of each will be extended to the middle of the river.

4. A long and undisputed possession establishes the rights of nations, otherwise there could be no peace, nor any thing stable amongst them, and remarkable facts ought to prove the possession. Thus when from time immemorial, a nation has without contradiction, exercised the sovereignty upon a river, which serves for its limits, nobody can dispute with that nation the supreme dominion.

5. If treaties determine any thing on this question they must be observed. The decision by conventions, being very express, are safest; and this is, in fact, the method taken by most powers at present.

If a river leaves its bed, whether it be dried up or whether it takes its course elsewhere, the bed belongs to the master of the river; for the bed made a part of the river, and he who had appropriated to himself the whole, had necessarily appropriated to himself the parts.

§ 267.
Of the bed
of a river
which is
dried up on
its taking
another
course.

If the country which borders on a river has no other limits than the river itself, it is in the number of the territories that have natural or indetermined limits (*territoria arcifinia*), and it enjoys the right of *alluvion*; that is the increase of land, which the course of the river may form by little and little; these additions of territory, in following nature, belong to the same master. For if I take possession of a territory, declaring that I will have it limited by the river which washes it, or if it is given upon this footing, I by this means possess before-hand the right of *alluvion*, and consequently,

§ 268.
of the right
of alluvion.

sequently, I alone may appropriate to myself the right of all which the current of the river shall insensibly add to my territory. I say *insensibly*, because in the uncommon cases named *avulsion*, when the violence of the stream separates a considerable piece of land and joins it to another, so that it may be known again, this piece of land naturally belongs to its first master. The civil law has thus provided against and decided this case when it happens between individual and individual; it ought to unite equity with the welfare of the state, and the care of preventing litigations.

In case of doubt, every country lying upon a river, is presumed to have no other limits but the river itself; because nothing is more natural than to take a river for a boundary, when a state is established on its borders: and wherever there is a doubt, that is always to be presumed, which is most natural, and most probable.

§ 269.
If the alluvion produces any change with respect to the rights on a river.

As soon as it is established that a river separates two territories, whether it remains common to the inhabitants on each of its banks, or whether each shares half of it; or whether, in short, it belongs entirely to one of them; their rights with respect to the river are no ways changed by the alluvion. If it happens then that by a natural effect of the current, one of the two territories, receives an increase, while the river gains by little and little on the opposite bank; the river remains the natural boundary of the two territories, and each preserves the same rights upon it notwithstanding its gradually changing its bed; so that, for instance, if it be divided in the middle, between the persons on each bank, that middle, though it changes its place, will continue to be the line of separation between the two neighbours. The one loses, 'tis true, while the other gains; but nature alone produces this change: it destroys the land of the one, while it forms fresh land for the other. This can be no otherwise determined, since they have taken the river alone for their limits.

§ 270.
What is the case when the river changes its bed.

But instead of its being gradually, and progressively displaced, the river, by an accident merely natural, turns entirely out of its course, and runs into one of the two neighbouring states, the bed it abandons must serve for the boundary; and it belongs to the master of the river (§ 267.): the river is lost in all that part of it, while it runs in its new bed, and there belongs only to the state in which it flows.

This case is very different from that of a river which changes its course, without going out of the same state. This continues, in its new course, to belong to the same master, either the state, or to him to whom the state has given it; because the river belongs to the public, in whatever part of the country it flows; the bed being abandoned, half of it is added on each side to the contiguous lands, if they are *arcifines*, that is, natural limits with a right of alluvion. This bed does not belong to the public, notwithstanding what we have said in § 267; on account of the right of alluvion possessed by its neighbours, and because here the public possessed that space only because the river flowed in it, but

but it belongs to the public if the adjacent lands are not *arcifinies*. The new soil over which the river takes its course is lost to the proprietor, because all the rivers in the country belong to the public.

It is not allowable to raise works on a bank of the water tending to turn its course, and to cast it upon the opposite bank, this would be to gain, by the prejudice of another. Each can only secure himself, and hinder the current from undermining and carrying away his lands. § 271. Of works tending to turn the current.

In general, no person ought to build on a river, any more than elsewhere, any work that is prejudicial to the right of another. If a river belongs to a nation, and another has incontestably a right of navigation upon it, the first cannot form a dam or mill that shall put a stop to its being navigable: its right in this case, is only that of a limited property, and it cannot exert it but by respecting the rights of others. § 272. Or in general prejudicial to the rights of others.

But when two different rights with respect to the same thing are found in opposition, it is not easy to determine which ought to yield to the other: no one can succeed in this without attentively considering the nature of the rights and their origin. For example, a river belongs to me, but you have a right to fish in it: may I construct on my river, mills that will render fishing more difficult and less advantageous? The affirmative seems to follow the nature of our rights, I, as proprietor, have an essential right in the thing itself; you have none but a right of use, accessory and dependent on mine: you have only in general, the right of fishing, as you can, in my river, such as it shall be, and in such a state as will be suitable to me to possess it. I do not take away your right by erecting my mills; it subsists in the general view of it, and if it becomes less useful to you, it is by accident, and because it is dependent on the exercise of mine. § 273. The rules in relation to two opposite rights.

It is not thus with the right of navigation, of which we are going to treat. This right necessarily supposes, that the river shall remain free and navigable: and therefore must exclude every work that will entirely interrupt its navigation.

The antiquity and origin of rights serve no less than their nature, to determine the question. The most ancient right is absolute, and to be exerted in its full extent, and the other only so far as it may be extended without prejudice to the first; for it could only be established on this footing, unless the possessor of the first right expressly consented to its being limited.

In the same manner, rights ceded by the proprietor are considered as ceded without prejudice to the other rights that belong to him, and only so far as they may agree with them; unless an express declaration on the very nature of the right determine it otherwise. If I have ceded to another the right of fishing in my river, it is manifest that I have ceded it without prejudice to my other rights, and that I remain free to build on that river such works as I think proper, though they should even injure the fishery, provided they do not destroy it entirely. A work of this last kind, such as a dam that would hinder the fish from ascending it, could not be built but

in a case of necessity, and according to circumstances, recompensing him who has a right of fishing.

§ 274.
Of lakes.

What we have said of streams and rivers, may be easily applied to lakes. Every lake intirely included in a country, belongs to the nation who is the proprietor of that country, which in possessing a territory is considered as having appropriated to itself every thing included in it; and as it seldom happens that the property of a lake of any considerable bigness falls to the share of individuals, it remains common to the nation. If this lake is situated between two states, it is presumed to be divided between them at the middle, while there is no title, no constant and manifest custom to determine otherwise.

§ 275.
Of the increase of a lake.

What has been said of the right alluvion, in speaking of rivers, ought also to extend to lakes. When a lake, which terminates a state, belongs entirely to it, the increase of the lake follows the possession of every thing else; but it is necessary that the increase should be insensible, as that of land in alluvion, and that the increase should be real, constant, and compleat; to explain myself: 1. I speak of insensible increase, this is the reverse of alluvion; the enquiry here is the increase of the lake, and in other cases that of the land. If this increase be not insensible, if the lake by breaking down its banks, suddenly overflows a large country, this new portion of the lake, this country covered with water still belongs to its ancient master. Upon what can they found the acquisition in behalf of the master of the lake? The space is very easily known again, though it has changed its nature, and too considerable for any one to presume that the master had no intention to preserve it, notwithstanding the change that might happen.

But 2. If the lake insensibly undermines a part of the opposite territory, destroys it, and renders it impossible to be known, by establishing itself there, and adding it to its bed, that part of the territory perishes with respect to its master, and no longer exists, and the whole of the lake thus increased still belongs to the same state as before.

3. If some of the lands bordering on the lake, are only overflowed at high water, this transient accident cannot produce any change in their dependence. The reason why the soil, which the lake invades by little and little, belongs to the master of the lake, and perishes with respect to the antient proprietor, is because the proprietor has no other limits besides the lake, nor any other marks besides its banks, to ascertain how far this possession extends. If the water advances insensibly he loses, if it retires in like manner he gains: such must have been the intention of the people who have respectively appropriated the lake and the neighbouring territories to each other; it can scarcely be supposed, that they had any other intention. But a territory overflowed for a time, is not confounded with the rest of the lake; it is still to be known, and the master may preserve his right, as proprietor. Were it otherwise, a town overflowed by a lake, would change

change its government during the inundation, and return to its antient master as soon as the waters were dried up.

4. For the same reason, if the waters of the lake penetrating by an opening into the neighbouring country, there form a bay, or new lake, joined to the first by a canal; this new mass of water, and the canal, belong to the master of the country in which they are formed. For the limits are easily known; and it cannot be presumed that he had any intention to abandon so considerable a space when it happened to be invaded by the waters of the neighbouring lake.

It must here be observed that in these questions, we are treating of the affair between state and state: it is to be decided by other principles when it relates to the proprietors, who are members of one and the same state. Here it is not merely the limits of the soil which determine the possession of it; it is also its nature, and use. An individual who possesses a field on the borders of a lake, cannot enjoy it as a field when it is overflowed; he who has, for example, the right of fishing in the lake, may exert this right in this new extent: if the waters retire, the field is restored to the use of its master. If the lake penetrates by an opening into the low lands in its neighbourhood, and lays them constantly under water, this new lake belongs to the public, because all the lakes belong to the public.

The same principles shew, that if the lake insensibly forms an accession of land on its banks, either by retiring or in any other manner, this increase of land belongs to the country to which it is joined when that country has no other limits but the lake. This is the same as the alluvion on the banks of a river.

§ 276.
Land formed on the banks of a lake.

But if the lake happens to be suddenly dried up, either totally, or in a great part of it, the bed remains in the possession of the sovereign of the lake; the nature of the soil, so easily known, sufficiently marking out the limits.

§ 277.
Of the bed of a lake dried up.

The empire, and jurisdiction over lakes and rivers, is subject to the same rules as property, in all the cases in which we have examined it. Each state has naturally a dominion over part or over the whole. We have seen (§ 245.) that the nation, or its sovereign, commands in all places in his possession.

§ 278.
Of the jurisdiction over lakes and rivers.

C H A P. XXIII.

Of the Sea.

IN order to complete the expositions of the principles of the law of nations, in regard to the things a nation may possess, it remains to treat of the sea. The use of the open sea consists in navigation, and in fishing; along its coasts it is moreover of use for the procuring of several things found near the shore, such as shell-fish, amber, pearls, &c. for making of salt, and in short, for the establishment of places of retreat and security for vessels.

§ 279.
Of the sea and its use.

§ 280.
If the sea
can be pos-
sessed and
its domi-
nion appro-
priated.

The open sea is in its own nature not to be possessed, nobody being able to settle there so as to hinder others from passing. But a nation powerful at sea may forbid others to fish in and to navigate it, declaring that it appropriates its dominion to itself, and that it will destroy the vessels that shall dare to appear in it, without its permission. Let us see whether it has a right to do this.

§ 281.
Nobody
has a right
to appro-
priate to
himself the
use of the
open sea.

It is manifest that the use of the open sea, which consists in navigation and fishing, is innocent and inexhaustible; that is, he who navigates, or fishes in it, does no injury to any one, and that the sea, in these two respects, is sufficient for all mankind. Now nature does not give to man a right of appropriating to himself things that may be innocently used and that are inexhaustible, and sufficient for all; since, every one being able to find in their state of communion what was sufficient to supply their wants, to undertake to render themselves sole masters of them, and exclude all others, would be to deprive them, without reason, of the benefits of nature. The earth no longer furnishing without culture the things necessary or useful to the human race, who were extremely multiplied, it became convenient to introduce the right of property, in order that each might apply himself with more success to the cultivation of what fell to his share, and multiply by his labour the several things useful to life. Thus the law of nature approves the rights of dominion and property, which put an end to the primitive manner of living in common. But this reason could not take place with regard to things in themselves inexhaustible, which therefore cannot be justly appropriated. If the free and common use of a thing of this nature was prejudicial or dangerous to a nation, the care of its own safety authorised it to submit, if possible, that thing to its dominion, in order to permit the use of it with such precautions as prudence should direct. But this is not the case with the open sea, in which people may sail and fish without the least prejudice to any persons whatsoever, and without putting any other people in danger. No nation has then a right to lay claim to the open sea, or attribute the use of it to itself, to the exclusion of others. The kings of Portugal have formerly arrogated to themselves the empire of the seas of Guinea and the East Indies*; but the other maritime powers gave themselves little trouble about such a pretension.

§ 282.
The nation
that at-
tempts to
exclude
another,
does it an
injury.

The right of navigating and fishing in the open sea, being then a right common to all men, the nation who attempts to exclude another from that advantage, does it an injury, and gives a sufficient cause for war; nature authorising a nation to repel an injury; that is, to make use of force against whoever would deprive it of its rights.

§ 283.
It even does
an injury to
all nations.

We may moreover say, that a nation, which without a title would arrogate to itself an exclusive right to the sea, and support

* See Grotius' *Mare Liberum*, and Selden's *Mare Clausum*, Lib. I. Cap. XVII.

it by force, does an injury to all nations whose common right it violates; and all are at liberty to unite against it, in order to repress such an attempt. Nations have the greatest interest in causing the law of nations, which is the basis of their tranquillity, to be universally respected. If any one openly tramples it under foot, all may and ought to rise up against him; and by uniting their forces, to chastise the common enemy, they will discharge their duty towards themselves and towards human society, of which they are members (Prelim. § 22.)

However, as each has the liberty of renouncing its right, a nation may acquire exclusive rights of navigation and fishing by treaties, in which other nations renounce, in its favour, the right they receive from nature. These are obliged to observe their treaties, and the nation they have favoured has a right to maintain by force, the possession of its advantages. Thus the house of Austria has renounced in favour of England and Holland, the right of sending vessels from the Netherlands to the East-Indies. We may see in *Grætius de Jure Belli & Pacis, Lib. II. Cap. III. § 15.* many examples of the like treaties.

The rights of navigation, fishing, and others, that may be exercised on the sea, belonging to the right of mere ability (*jura mera facultatis*) are imprescriptible (§ 95.); they cannot be lost for want of use. Consequently, when a nation finds, that itself alone has from time immemorial been in the possession of a navigation or fishery in certain seas, it cannot, on this foundation, attribute to itself an exclusive right to them. For though others have not made use of their common right to navigation and fishery in those seas, it does not follow from thence, that they have had any intention to renounce it, and they have a right to make use of it whenever they think proper.

But it may happen, that a want of use may be attended with the nature of a consent, or a tacit pact, and thus become a title in favour of one nation against another. When a nation in the possession of the navigation and fishery in certain latitudes pretends an exclusive right, and forbids any other interfering in it; if these obey that prohibition with sufficient marks of acquiescence, they tacitly renounce their right, in favour of the other, and establish a right which the other may afterwards lawfully maintain against them, especially when it is confirmed by long use.

The various uses of the sea near its coast render it very susceptible of property. People there fish, and draw from thence shells, pearls, amber, &c. now in all these respects its use is not inexhaustible; so that the nation to whom the coasts belong, may appropriate to itself an advantage which it is considered as having taken possession of, and made a profit of it, in the same manner as it may possess the domain of the land it inhabits. Who can doubt, that the pearl fishery of Bahrem and Ceylon may not lawfully be enjoyed as property? And though a fishery for food appears more inexhaustible, if a nation has a fishery on its coasts that is particularly advantageous, and of which it may become

master, shall it not be permitted to appropriate this natural advantage to itself, as a dependence on the country it possesses; and, if there are a sufficient number of fish to furnish the neighbouring nations, of reserving to itself the great advantage it may receive from them by commerce? But if so far from taking possession of it, it has once acknowledged the common right of other nations to come and fish there, it can no longer exclude them from it; it has left that fishery in its primitive freedom, at least with respect to those who have been in possession of it. The English not having taken the advantage from the beginning of the herring fishery on their coast, it is become common to them with other nations.

§ 288.
Other reasons of appropriating the sea bordering on the coasts.

A nation may appropriate things, where the free and common use of them would be prejudicial or dangerous. This is a second reason for which powers extend their dominion over the sea along their coast, as far as they are able to protect their right. It concerns their safety and the welfare of the state, that the whole world be not permitted to come so near their possession, especially with men of war, as to hinder the approach of trading nations, and disturb navigation. During the war of Spain with the United Provinces, James I. king of England, caused to be drawn along his coast the limits within which he declared that he would not suffer any of the powers at war to pursue their enemies, nor even their armed vessels to stop and observe the ships that should enter or sail out of the ports*. These parts of the sea, thus subject to a state, are comprehended in its territory; no one can navigate them in spite of that nation. But it cannot refuse access to vessels not suspected, for innocent uses, without violating its duty; every proprietor being obliged to grant a passage to strangers, even by land, when it may be done without damage or danger. It is true, that the state itself is to judge of what is proper to be done in every particular case that is prevented, and if it judges amiss it is to blame; but the others ought to bear with it. It is not the same in cases of necessity: as for instance, when a vessel is obliged to enter a road which belongs to you to shelter herself from a tempest, in this case the right of entering any where, and causing no damage, or repairing it, is, as we shall shew more at large, a remainder of the primitive freedom, of which no man was ever able to deprive himself, and a vessel may lawfully enter in spite of you, if you unjustly refuse her.

§ 289.
How far this possession may extend.

It is not easy to determine to what distance a nation may extend its rights over the sea by which it is surrounded. Bodinus† pretends, that according to the common right of all maritime nations, the prince's dominion extends even thirty leagues from the coast. But this exact determination can only be founded on a general consent of nations, which it would be difficult to prove; each state may, in this respect, ordain what it shall think best, in rela-

* Selden's *Mare Clausum*, Lib. II.

† In his *Republic*, Book I. Chap. X.
tion

tion to what concerns the citizens themselves, or their affairs with the sovereign: but between nation and nation all that can reasonably be said, is, that in general, the dominion of the state over the neighbouring sea, extends as far as is necessary for its safety, and it can render it respected, since on the one hand, it can only appropriate to itself a thing that is common, as the sea, so far as it has need of it, for some lawful end (§ 281.); and on the other, it would be a vain and ridiculous pretension to claim a right that it was no ways able to cause to be respected. The fleets of England have given room to its kings to attribute to themselves the empire of the seas which surrounds that island, even as far as the opposite coasts*: Selden relates a solemn act † by which it appears, that that empire in the time of Edward I. was acknowledged by the greatest part of the maritime nations of Europe; and the republic of the United Provinces acknowledge it, in some manner, by the treaty of Breda in 1667, at least so far as related to the honours of the flag. But solidly to establish a right of such extent, it is necessary to shew very clearly the express, or tacit consent of all the powers concerned. The French have never agreed to this pretension of England, and in the same treaty of Breda, we have just mentioned, Louis XIV. would not even suffer the channel to be called the English Channel, or the British Sea. The republic of Venice claims the empire of the Adriatic, and every body knows the ceremony annually performed upon it, on that account. To confirm this right, there have been brought the example of Uladislas, king of Naples, of the emperor Frederic III. and of some of the kings of Hungary, who desired of the Venetians the permission to pass through the sea with their vessels ‡. That the empire belongs to the republic to a certain distance from the coast in the places of which it can keep possession, and which it is of importance to hold in regard to its own safety, is what appears to me to be incontestible: but I doubt very much whether any power is at present disposed to acknowledge her sovereignty over the whole Adriatic Sea. These pretended empires are respected while the nation that lays claim to them is able to support them by force; but they fall with its power. At present the whole space of the sea within cannon shot of the coast is considered as making a part of the territory, and for that reason a vessel taken under the cannon of a neutral fortress is not a good prize.

The banks of the sea belong incontestibly to the nation that possesses the country of which it is a part; and these are the number of public things. If the Roman civilians place them in the rank of things common to all the world (*res communes*) it is only in regard to their use; and we ought not to conclude from it, that they considered them as independent of the empire; the very contrary appears from a great number of laws. The ports

§ 290.
Of banks
and ports.

* See Selden's *Mare Clausum*.

† Ibid. Lib. I. Cap. XVI.

‡ Ibid. Lib. II. Cap. XXVIII.

and harbours are manifestly a dependence and even a part of the country, and consequently are the property of the nation. We may apply to them, as to the effects of the domain of the empire, every thing that has been said of the land itself.

§ 191.
Of bays
and
straights.

All we have said of the parts of the sea near the coast may be said more particularly, and with much greater reason, of the roads, bays, and streights, as still more capable of being occupied, and of greater importance to the safety of the country. But I speak of the bays and streights of small extent; and not of those great parts of the sea to which these names are sometimes given, as Hudson's Bay and the Streights of Magellan, over which the empire cannot extend, and still less a right of property. A bay whose entrance may be defended, may be possessed and rendered subject to the laws of the sovereign, and it is of importance that it should be so, since the country may be much more easily insulted in such a place, than on the coast, open to the winds, and the impetuosity of the waves.

§ 192.
Of streights
in particu-
lar.

It must be remarked with regard to the streights, that when they serve for a communication between two seas, the navigation of which is common to all, or to many nations, he who possesses the streight, cannot refuse others a passage through it, provided that passage be innocent, and attended with no danger to the state. Such a refusal, without just reason, would deprive these nations of an advantage granted them by nature; and indeed, the right of such a passage is a remainder of the primitive liberty enjoyed in common. Nothing but the care of his own safety can authorize the master of the streight, to make use of certain precautions, and to require the formalities commonly established by the custom of nations. He has a right to levy small duties on the vessels that pass, on account of the inconvenience they give him by obliging him to be on his guard; by the security he procures them in protecting them from their enemies, and keeping pirates at a distance; and the expence he is at in maintaining light-houses, sea-marks, and other things necessary to the safety of the mariners. Thus the king of Denmark requires a custom at the streights of the sound. Such rights ought to be founded on the same reasons, and to be subject to the same rules as the tolls established by land or on a river. See (§ 103, and 104.)

§ 193.
The right
to wrecks.

It is necessary to mention the right to shipwrecks, the unhappy fruits of barbarism, and which almost every where disappeared with it. Justice and humanity cannot allow of it except in the only case where the proprietors of the effects saved from a wreck cannot be certainly known. In this case, these effects belong to the first possessor, or to the sovereign, if the laws gives him a right to them.

§ 194.
Of the sea
inclosed
within the
territories
of a nation.

If a sea is found entirely enclosed by the land of a nation, with only a communication with the ocean by a channel, of which that nation may take possession, it appears that such a sea is no less capable of being occupied, and becoming property than the land; and it ought to follow the fate of the country that surrounds it. The Mediterranean was formerly included within the lands of the Romans;

Romans; that people, by rendering themselves masters of the streight that joins it to the ocean, might subject it to their empire and add it to their domain. They did not by this means injure the rights of other nations; a particular sea being manifestly designed by nature for the use of the countries and the people who surround it. Besides in defending the entrance of the Mediterranean from all suspected vessels, the Romans secured by one single stroke the immense extent of their coast; this reason was sufficient to authorise them to possess it. And as it has an absolute communication with none but their state, they were at liberty to permit or prohibit the entrance into it, in the same manner as into any of their towns and provinces.

When a nation takes possession of certain parts of the sea, it enjoys the empire, as well as the domain; from the same reason, we have alledged in treating of land (§ 205.) These parts of the sea are within the jurisdiction or the territory of the nation; the sovereign commands there, he makes laws, and may punish those who violate them; in a word, he has the same rights there as at land, and in general all those given him by the law of the state.

§ 295.
Of the parts
of the sea
possessed by
a power,
that are not
within his
jurisdiction.

It is however true, that the *empire* and *domain*, or the *property* are not inseparable in their own nature, even in a sovereign state *. So that a nation may possess as property, the domain of a state at land or sea without having the sovereignty; it may also happen that it may have the empire of a place where the property or the domain with respect to use belongs to some other nation. But it is always presumed that when it possesses the useful domain of any place whatsoever, it has also the high domain and the empire or sovereignty (§ 205.) It cannot however be concluded that he who has the empire, has also the useful domain; for a nation may have good reason to claim the empire in a country, and particularly in a space at sea, without pretending to have any property, on any useful domain. The English have never pretended to have a property in all the seas over which they have claimed the empire.

This is all we have to say in this first book. A larger detail of the duties and rights of a nation with respect to itself would have led us too far: they should be sought for, as we have already said, in particular treaties on the public and political law. We are very far from flattering ourselves that we have omitted no important article: this is a slight sketch of an immense picture: but an intelligent reader will without difficulty supply all our omissions by making use of general principles: we have taken the utmost care solidly to establish these principles; and to unfold them clearly and with precision.

* See Book II. § 83.

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THE L A W OF N A T I O N S.

B O O K II.

Of a Nation considered relatively to others.

C H A P. I.

Of the Common Duties of a Nation towards others, or of the Offices of Humanity between Nations.

THE following maxims will seem very strange to cabinet politicians, and such is the misfortune of mankind, that to many of those refined conductors of nations, the doctrine of this chapter will be a subject of ridicule. Let it be such, while we boldly lay open what the law of nature prescribes to nations. Shall we be intimidated by ridicule, when we speak after Cicero? That great man held the reins of the most potent state that ever existed, and in that station appeared no less eminent than at the bar. The punctual observation of the law of nature, he considered as the most salutary policy to the state. I have already quoted this fine passage: *Nihil est quod adhuc de republica putem dictum, & quo possim longius progredi, nisi sit confirmatum, non modo falsum esse illud, sine injuria non posse, sed hoc verissimum sine summa justitia Republicam regi non posse* *. I might say on good

§ 1.
Foundation
of the com-
mon and
mutual du-
ties of
nations.

* *Fragm. ex Lib. II. De Republica.*

grounds,

grounds, that by these words *summa justitia* Cicero means that universal justice which consists in the entire and absolute accomplishment of the law of nature. But in another place he explains himself more clearly on this head, and gives us sufficiently to understand that he does not limit the mutual duties of men to the observation of justice, properly so called. "Nothing, says he, is more agreeable to nature, more capable of giving a true satisfaction, than, in imitation of Hercules, to undertake even the most arduous and painful labours for the benefit and preservation of all nations." *Magis est secundum naturam, pro omnibus gentibus, si fieri possit, conservandis, aut juvandis maximos labores molestiasque suscipere, mitantem Herculem illum, quem hominum fama, beneficiorum memor, in concilium, cœlestium collocavit; quam vivere in solitudine, non modo sine ullis molestiis, sed etiam in maximis voluptatibus, abundantem omnibus copiis ut excellas etiam pulchritudine & viribus. Quocirca optimo quisque & splendidissimo ingenio longe illam vitam huic anteponebat* *. Cicero in the same chapter expressly refutes those who are for excluding strangers from the duties to which they acknowledge themselves bound towards their fellow citizens. *Qui autem civium rationem dicunt abendam, externorum negant, hi dirimunt communem humani generis societatem: quâ sublata, beneficentia, liberalitas bonitas, justitia funditus tollitur: quæ qui tollunt, etiam adversus Deos immortales impii judicandi sunt; ab iis enim constitutam inter homines societatem evertunt.*

And why should we not hope still to find among those who are at the head of affairs, some wise persons, who are convinced of this great truth: that virtue is, even for sovereigns and political bodies, the most certain road to prosperity and happiness. There is at least one benefit to be expected from the open assertion and publication of sound maxims, which is, that thereby even they who least relish them, are, in regard to their reputation, laid under a necessity of keeping within some bounds. To expect that men, and especially men in power, will conform to the strictness of the laws of nature would be a gross mistake, and to renounce all hope of making impression on some of them, would be to give up mankind for lost.

Nations as obliged by nature reciprocally to cultivate human society (Prelim. § 11.) are bound to observe towards each other all the duties which the safety and advantage of that society require.

§ 2.
Offices of
humanity
and their
foundation.

The offices of humanity are those succours, those duties, to which men are reciprocally obliged as men, that is, as social beings which necessarily stand in need of a mutual assistance for their preservation, for their happiness, and for living in a manner conformable to their nature. Now the laws of nature being no less obligatory to nations than individuals (Prelim. § 5.) what a man owes to other men, a nation, in its manner, owes to other

* *De Officiis, Lib. III. Cap. V.*

nations (Prelim. § 10. &c.) Such is the foundation of the common duties of those offices of humanity to which nations are reciprocally bound one to another. They consist generally in doing for the conservation and happiness of others all that is in our power, as far as this is reconcileable with our duties towards ourselves.

The nature and essence of man being incapable of sufficing § 3. itself, preserving itself, persecuting itself, or of living happily without the assistance of others of his species, is a plain indication that General principles of all the mutual duties of nations. he is disposed to live in a society for mutual assistance; and consequently that all men by their very nature and essence are obliged to unite their endeavours and labours for the perfection of their being, and their condition. The surest method of succeeding herein, is, that every one first labours for himself, and then for others. Hence it follows, that whatever we owe to ourselves, we likewise owe to others, as they stand in need of succour, and we can succour them without being wanting to ourselves. Since then one nation owes, in a manner, to another nation, what one man owes to another, we may confidently lay down this general principle: one state owes to another state whatever it owes to itself, as far as this other stands in real need of its assistance, and the latter can grant it without neglecting the duties it owes to itself. Such is the eternal and immutable law of nature. They to whom this may appear a total subversion of sound policy it is to be hoped will be convinced by the two following considerations.

1. Social bodies or sovereign states are much more capable of supporting themselves than individuals, and mutual assistance is not so necessary among them, nor of such frequent use. Now whatever a nation can do itself, no succour is there due to it from others.

2. The duties of a nation towards itself, and chiefly the care of its own safety, require much more circumspection and reserve, than is to be observed by a private person in his assisting others. This remark we shall soon illustrate.

Of all the duties of a nation towards itself, the chief object is its § 4. conservation and perfection, together with that of its condition. Duties of a nation for the conservation of others. The detail given of it in the first book of this work may serve to indicate the several objects relatively to which a state may and should assist another state. Therefore every nation is, on occasion, to labour for the preservation of others, and for securing them from destruction and ruin as far as it can, without exposing itself too much. Thus when a neighbouring nation is unjustly attacked by a powerful enemy, threatening to over-run and oppress it, if you can defend it without exposing yourself to any great danger, unquestionably it is your duty. Do not object that a sovereign is not to expose the lives of his soldiers, for the safety of a foreign nation with which he has not contracted a defensive alliance. It may be his own case to stand in need of succour, and consequently to promote and exert the spirit of assistance, is acting

acting for the safety of his own nation. Accordingly, policy here coincides with, and enforces obligation and duty. It is the interest of princes to stop the progress of an ambitious power, which aims at a farther aggrandizement by subduing its neighbours. A powerful league was formed in favour of the United Provinces when threatened with the yoke of Lewis XIV *. When the Turks had laid siege to Vienna, the brave Sobieski, king of Poland, with an army came and saved the house of Austria †. And possibly, by the same glorious action, all Germany and his own kingdom.

§ 5.
It is to assist
a nation
under fa-
mine or any
other cala-
mities.

From the same reason, if a people labour under a famine, all having a quantity of provisions, are to relieve its distress, yet without exposing themselves to want. But if this nation is able to pay for the provisions thus furnished, it is entirely lawful to sell them at a reasonable rate; for what it can procure is not due to it, and consequently there is no obligation of giving for nothing such things as it is able to purchase. Succour, in such a severe extremity, is essentially agreeable to human nature, and a civil nation very seldom is seen to be absolutely wanting in such. The great Henry the IVth. would not deny promises to obstinate rebels bent on his destruction ‡.

Whatever be the calamity with which a nation is afflicted, the like assistance is due to it. We have seen little states in Switzerland order public collections to be made in behalf of towns or villages of neighbouring countries which had been ruined by fire, and remit them liberal succours; no difference of religion diverting them from a work of such true piety. The calamities of Portugal have given England an opportunity of fulfilling the duties of humanity with that generosity which distinguishes an opulent, powerful, and magnanimous nation. On the first advice of the misfortune of Lisbon ||, the parliament voted a hundred thousand pounds sterling for the relief of an unfortunate people; the king also was pleased to add considerable sums: ships loaded with provisions and all kinds of succours were sent away with the utmost dispatch; and their arrival convinced the Portuguese, that in those who understand the rights of humanity, the opposition of belief and worship is no obstacle to their beneficence. On the same occasion, the king of Spain likewise signalised for a near ally, his tenderness, his sympathy, and generosity.

§ 6.
To contri-
bute to the
perfection.

A nation must not confine itself to the preservation of other states; it should, likewise, according to its power and their want of its assistance, contribute likewise to their perfection. We have already shewn (Prelim. § 13.) that this general obligation is incumbent on it from natural society: this is now a proper place for entering into some detail of it. A state is more or less perfect, as it is more or less adapted to obtain the end of civil society, which consists in procuring to its members all things re-

* In 1672. † He defeated the Turks and drove them from Vienna in 1683.

‡ At the famous siege of Paris. || The earthquake by which the greatest part of that city was destroyed.

lating to the necessities, conveniences and enjoyments of life, and to their welfare in general; likewise in providing for the peaceful enjoyment of property, and the safe and easy administration of justice; in fine, for defence against any foreign violence (Book I. § 15.) Thus every nation should occasionally, and according to its power, contribute, not only that another nation may enjoy these advantages, but likewise render it capable of procuring them itself. Accordingly a learned nation, if applied to for masters and teachers in the sciences, by another desirous of shaking off its native barbarism, it is not to refuse such a request. A nation whose happiness it is to live under wise laws should, on occasion, make it a point to communicate them. Thus when the wise and virtuous Rome sent ambassadors to Greece for collecting good laws, the Greeks were very far from rejecting a request so equitable and worthy of commendation.

But though a nation be obliged to promote, as far as lies in its power, the perfection of others, it is not entitled forcibly to obtrude these good offices on them. Such an attempt would be to violate their natural liberty. To compel any one to receive a kindness, requires an authority over him; and nations are absolutely free and independent (Prelim. § 4.) Those ambitious Europeans who attacked the American nations, and subjected them to their insatiable avidity of dominion, in order, as they pretended, for civilizing them, and causing them to be instructed in the true religion; these usurpers, I say, grounded themselves on a pretence equally unjust and ridiculous. It is strange to hear the learned and judicious Grotius say, that a sovereign may justly take up arms to chastise nations which are guilty of enormous faults against the laws of nature, *which treat their parents with inhumanity like the Soldans; which eat human flesh as the ancient Gauls, &c.* What led him into this error was, his attributing to every independent man, and thereby even to every sovereign, an odd kind of right to punish faults which imply an enormous violation of the laws of nature; though relating neither to his right nor his safety. We have shewn (Book I. § 169.) that men entirely derive the right of punishment from the law of safety, and consequently it belongs to them only against those by whom they have been injured. Could it escape Grotius, that notwithstanding all the precautions added by him in the following paragraphs, his opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretences? Mahomet and his successors have desolated and subdued Asia to revenge the indignity done to the unity of the Godhead; all whom they termed associators or idolaters, fell victims to their devout fury.

As the reciprocation of these duties or offices of humanity is to take place betwixt nation and nation, according as one stands in need, and the other can reasonably comply with them; every

§ 7.
But not by
force.

§ 8.
Of the right
of acquiring
the offices
of humani-
ty.

* *De jure Belli et Pacis, Lib. II. Cap. XX. § 21.*

nation

nation being free, independent, and having the disposal of its actions, each is to consider whether its situation warrants asking or granting any thing on this head. Thus 1. Every nation has a perfect right to ask of another that assistance and kind offices which it conceives itself to stand in need of. This it cannot be denied without injury. If the demand be unnecessary, it is thereby guilty of a breach of duty; but herein it does not depend on the judgment of another. A nation has a right of asking but not of requiring.

§ 9.
Of the right
of judging
whether
they are to
be granted.

For 2. These offices being due only in necessity, and by a nation which can comply with them without being wanting to itself; the nation which is applied to has, on the other hand, a right of judging whether the case really demand them, and whether circumstances will allow it to grant them consistently with what is owing to its own safety and concerns: for instance, a nation is in want of corn, and makes a demand to purchase a quantity of another; this is to judge whether such a compliance will not expose itself to scarcity; and a denial is to be acquiesced in, without resentment. We have very lately seen a prudent performance of this duty in Russia; it generously assisted Sweden when threatened with a famine; but refused other powers the liberty of purchasing corn in Livonia, itself standing in need of it, and without doubt likewise with substantial reasons of policy.

§ 10.
A nation is
not to com-
pel another
to perform
those offices
the denial
of which is
no wrong.

Thus the right which a nation has to the offices of humanity is but imperfect: it cannot compel another nation to the performance of them. That nation which unreasonably declines them offends against equity, which consists in acting conformable to the imperfect right of another, but thereby no injury is done; injury or injustice being a trespass against the perfect right of another.

§ 11.
Of the mu-
tual love of
nations.

It is impossible that nations should mutually discharge all these several duties if they do not love each other. This is the pure source from which the offices of humanity should proceed; they will preserve the character and perfection of it. Then nations will be seen sincerely and cordially to help each other, earnestly to promote the common welfare, and cultivate peace without jealousy or distrust.

§ 12.
Every one
to cultivate
the friend-
ship of
others.

A real friendship will be seen to reign among them, and this happy state consists in a mutual affection. Every nation is obliged to cultivate the friendship of others, carefully avoiding whatever might kindle enmity. To this present and direct interest often invites wise and prudent nations: a more noble interest, more general and less direct, is too rarely the motive of politicians. If it be incontestible that men are to release each other in order to answer the views of nature and discharge the duties which it prescribes them, as well as for their own advantage; can it be questioned that nations are not under the like reciprocal obligations? Is it in the power of men, on dividing themselves into different political bodies, to break the ties of the universal society which nature has established amongst them?

If

If a man should qualify himself for being useful to other men, ^{§ 13.} and a citizen for doing good service to his country and fellow citizens; a nation likewise, in perfecting itself, is to have in view its being rendered thereby more capable of promoting the perfection and happiness of other nations; it is to be careful in setting them good examples, and consequently avoid setting them a pattern of any thing evil. Imitation is natural to mankind: the virtues of a celebrated nation are sometimes imitated, and much more frequently its vices and defects.

Glory being of such great value and importance to a nation, ^{§ 14.} as we have shewn in an express chapter *. The obligation of a people extends even to the care of the glory of others; first, it should on occasion contribute to put them in a condition of acquiring true glory; secondly, do them in this respect all the justice due to them, and use all proper endeavours that such justice be universally done them. Lastly, far from irritating, it should kindly extenuate the bad effect which some slight blemishes may produce.

From the manner in which we have established the obligation of performing the offices of humanity, it plainly appears to be solely founded on the nature of man. Therefore no nation can refuse them to another, under pretence of its professing a different religion: the being a man gives a title to them. A conformity of belief and worship may become a new tie of friendship betwixt nations, but no difference in them can warrant us to lay aside the quality of men, or the sentiments annexed to it. As we have already related (§ 35.) some instances well worthy of imitation, let us here do justice to the wise pontiff who lately filled the see of Rome †, and has given a very remarkable example, and which cannot be too highly commended. This sovereign being informed that several Dutch ships being at Civita Vecchia not daring to put to sea for fear of some Algerine corsairs cruising in those parts, he immediately issued orders that the frigates of the ecclesiastical state should convoy those ships out of danger; and his nuncio at Brussels received instructions for signifying to the minister of the states-general, that his holiness made it a law to himself to protect commerce and perform the duties of humanity without minding any difference of religion. Such exalted sentiments cannot fail of raising a veneration for Benedict XIV. even amongst protestants.

How happy would mankind be, were these aimiable precepts of nature every where observed: nations would communicate to each other their products and their knowledge; a profound peace would prevail all over the earth and diffuse its invaluable fruits; industry, the sciences and the arts would be employed to procure our happiness, no less than to relieve our wants; violent methods of contest would be no more heard of: differences would be terminated by moderation, justice, and equity; the world would

* Book I. Chap. XV.

† The worthy Pope Benedict XIV.

the appearance of a large republic; men live every where like brothers, and each individual be a citizen of the universe. That this idea should be but a delightful dream! yet it flows from the nature and essence of man*. But disorderly passions, private and mistaken interest will never allow of its reality. Let us then consider what limitation the present state of men, the maxims and usual conduct of nations may superinduce to the practice of these precepts of nature, in themselves so endearing and salutary to the law of nature, which cannot condemn the good to become the dupes and prey of the wicked, and the victims of their injustice and ingratitude. Melancholy experience shews that most nations mind only strengthening and enriching themselves, at the expence of others, at lording it over them, and even if an opportunity offers, of oppressing and bringing them under the yoke. Prudence does not allow us to strengthen an enemy, or him in whom we discover a desire of plundering and oppressing us, and the care of our own safety forbids it. We have seen (§ 3, &c.) that a nation does not owe its assistance and offices of humanity to another, any farther than as they are reconcilable with the duties towards itself. Hence it evidently follows, that though the universal love of mankind obliges us to grant at all times, and to all, even to our enemies, those offices which are of a tendency to render them more moderate and virtuous, because no inconvenience is to be feared from such dispositions, we are not obliged to give them such succours as probably may become pernicious to ourselves. Thus the exceeding importance of trade not only to the wants and conveniences of life, but likewise to the forces of a state for furnishing it with the means of defending itself against its enemies, and the insatiable avidity of those nations which seek totally to engross it exclusive of others; thus, I say, these circumstances authorise a nation possessed of a branch of trade, or the secret of some important manufacture or fabric to reserve to itself those sources of wealth, and so far from communicating them, to take measures against it; but things necessary to the life or convenience of others, this nation must sell them at a reasonable price, and not abuse its monopoly by iniquitous and hateful exactions. To commerce England chiefly owes its power and safety: who then will presume to blame the strict attention of that people for keeping the several branches in its own hand, by every just and equitable method?

As to things more directly useful for war, a people is under no obligation of selling them to others of whom it has any well-grounded suspicion; and even prudence declares against it. Thus very justly, by the Roman laws, the art of building galleys was not to be communicated to other nations. Thus in England

* Ergo unum debet esse omnibus propositum, ut eadem sit utilitas uniuscujusque et universorum: quam si ad se quisque rapias, dissolvetur omnis humana consortio, atque si etiam hoc natura præferibit, ut homo homini, quisque sit ob eam ipsam causam, quod is homo sit, consultum velit necesse est secundum eandem naturam omnium utilitatem esse communem. *De Offic. Lib. III. Cap. VI.*

laws have been enacted, that the best method of ship-building should not be carried out of the kingdom.

This caution is to be carried farther, to nations more justly suspected. Thus when the Turks, to use the expression, in their ascendant, in the flame of their conquests, it behoved all Christian nations, exclusively of any bigotry, to look on them as their enemies. The most distant, they which at that time had no dispute with them, might break off all commerce with a power professedly subduing, by force of arms, all who would not acknowledge the authority of its prophet.

Let us farther observe with regard to the prince in particular, that he is not, without reserve, to comply with all the motions of a magnanimous and disinterested heart, postponing his interests to the advantage of others, or to generosity; it is not his private interest, on which the question turns, but that of the state of the nation which has committed itself to his care. Cicero says that a great and elevated soul despises pleasures, wealth, life itself, and makes no account of them when the common utility lies at stake*. He is in the right, and such sentiments are to be admired in a private person; but generosity never injures the property of another. The head or conductor of a nation is, in public affairs, to practise it with circumspection, and no farther than it will redound to the glory and real advantage of the state. As to the common good of human society, he is to consider it with the same attention to which the nation he represents would be obliged, were the government of its affairs in its own hand.

§ 17.
Particular
limitation
with regard
to the
prince.

But though the duties of a nation towards itself, set bounds to the obligation of performing the offices of humanity; they cannot, in the least, affect the prohibition of doing any injury to others, of causing them any unjust detriment. To hurt, to offend, to do injury, to cause damage or prejudice, are not precisely of the same import. To hurt any one is, in general, to augment the imperfection of himself or that of his condition; to render his person or condition more imperfect. If every man is obliged, even by his very nature, to assist in the perfection of others, he is much more forbid to increase their imperfection and that of their state. The same duties are incumbent on nations (Prelim. § 5. 6.); none of them is to commit any actions tending to impair the perfection of others, and that of their condition, or to impede their progress; that is, to trust them; and since the perfection of a nation consists in its aptitude in obtaining the end of civil society, and that of its state, in not wanting any of the things necessary to that end (Book I. § 14.); no one is to hinder another from obtaining the end of civil society, or to render it incapable of those ends. This general principle prohibits all nations every evil practice tending to create disturbance in another state, to foment discord, or corrupt its citizens, to alienate its allies, to raise enemies, to sully its reputation, and to

§ 18.
No nation
is to hurt
others.

deprive it of its natural advantages. However, it will be easily conceived that negligence in fulfilling the common duties of humanity, and even the refusal of these duties or offices is not an injury. To neglect or refuse contributing to the perfection of a nation is not impairing that perfection. It must be further observed, that when we are making use of our right, when we are doing what we owe to ourselves or to others; if, from this action of ours any prejudice results to the perfection of another, as some damage to its outward condition, we are not guilty of an injury; we are doing what is lawful, or even what we ought. The damage, or whatever it happens to suffer, was no part of our intention; is an accident, of which the particular circumstances determine the imputability. For instance, in case of a lawful defence, the injury we do to the aggressor is not our intention; we act in consideration of our own safety; we make use of our right, and whatever evil befalls the aggressor, he alone is in fault.

§ 19.
Of offences.

Nothing is more opposite to the duties of humanity, nor more contrary to the society which should be cultivated by nations than offences, or actions which give a just displeasure to others: every nation therefore should avoid giving any real offence; I say, a real; for should he who manifests a displeasure at our behaviour, when we are only using our rights, or fulfilling our duties, he is to blame, not we. Offences excite such asperity and rancour between nations, that we should avoid giving any room even for ill-grounded offences, when it can be done without any inconvenience, or failure in our duty. It is said, that some medals and dull jests were what irritated Lewis XIV. against the United Provinces, and where the chief cause of his expedition in 1672, by which that republic was brought to the brink of ruin.

§ 20.
Ill custom
of the an-
cients.

The maxims laid down in this chapter, as the sacred precepts of nature, were for a long time unknown to nations. The ancients had no notion of any duty they owed to a nation to whom they were not united by a treaty of friendship. The Jews especially placed a great part of their zeal in hating all nations; but they likewise were detested and despised by them. At length the voice of nature came to be heard amongst civilised nations; they perceived that all men are brethren*. When will the happy time come that they shall behave as such?

C H A P. II.

Of the mutual Commerce of Nations.

§ 21.
Of the mu-
tual com-
merce of
nations.

ALL men are to find on earth the things they stand in need of. In the primitive state of community they took them wherever they happened to meet with them, if another had not before ap-

* See (§ 1.) a fine passage of Cicero.

propriated them to his use. The introduction of property and dominion could not deprive men of so essential a right, and consequently it cannot take place without leaving them, in general, some means of procuring what is useful or necessary to them. This means is trade; by this every man may still supply his wants. Things being now become property, there is no obtaining them without the owners consent; nor are they usually to be had for nothing, but they may be bought or exchanged for others equivalent. Therefore men are obliged, in regard to the views of nature, reciprocally to exercise this trade; and this obligation relates also to whole nations or states (Prelim. § 5). It is seldom that nature is seen in one place to produce every thing man stands in need of; one country abounds in corn, another in pastures and cattle, a third in timber and metals: all these countries trading together, agreeably to human nature, no one will be without such things as are useful and necessary, and the views of nature, our common mother, will be fulfilled. Farther, one country is fitter for some kind of products than another; as for vineyards, more than tillage. If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its industry and its ground in the most advantageous manner; and mankind in general proves a gainer by it. Such are the foundations of the general obligation incumbent on nations reciprocally to cultivate commerce.

Therefore every one is not only to join in this trade, as far as it reasonably can, but even to countenance and promote it. The care of the public roads, staples, places of sale, well-regulated fairs; all contribute to this end. And as for the requisite expences, a nation, as we have already observed (Book I. § 103.) may defray them by tolls and other duties in an equitable proportion.

Freedom, being very useful to commerce, it is implied in the duties of nations, that instead of unnecessary burdens or restrictions, they should support it as far as possible; therefore those privileges, those particular duties which obtain in many places so oppressive to commerce, are blameable, unless founded on very important reasons arising from the public good.

Every nation, in virtue of its natural liberty, has a right to trade with those which shall be willing to correspond with such intentions; and to molest it in the exercise of its right is an injury. The Portuguese, at the time of their great power in the East-Indies, were for excluding all other European nations from any commerce with the Indians; but a pretension no less iniquitous than chimerical was made a jest of; and the nations agreed to look on any acts of violence in support of it, as just causes of a war. This common right of all nations is, at present, generally acknowledged under the appellation of freedom of trade.

If it be in general the duty of a nation to carry on a commerce with others, and every one has a right to trade with those who are willing; on the other hand, a nation is to decline a commerce

§ 11.
We should
favour
trade.

§ 12.
Of the freedom
of
trade.

§ 13.
Of the right
of trading
belonging
to nations.

§ 14.
Every one
is to judge
whether it
be proper
for it to
which
trade.

which is disadvantageous or dangerous (Lib. 1. § 98.) and since in case of a collision the duties towards oneself are to take the lead of the duties towards others, it has a full power of being determined herein by what is useful or salutary. We have seen (Book I. § 92.) that besides the right, it is a nation's duty to judge whether it be expedient to join in a trade proposed, or not; therefore it may close with, or refuse any commercial overtures from foreigners, without giving them a right to accuse it of injustice, or to demand a reason for such a refusal, much less to make use of compulsion. It is free in the administration of its affairs, without being accountable to any other. The obligation of trading with a foreign state is imperfect in itself (Prelim. § 17.) and gives them only an imperfect right; so that in cases where the commerce would be detrimental, it is entirely void. The Spaniards falling on the Americans under a pretence that these people refused to traffic with them, endeavoured in vain to cover their insatiable avarice.

§ 26.
Necessity
of treaties
of com-
merce.

These few remarks, together with what we have already said on the subject (Chap. VIII. Book I.) may suffice to establish the principles of the natural law of nations on the mutual commerce of states. It is not difficult to point out, in general, what are the duties of nations in this respect, and what the law of nature prescribes to them for the good of the great society of mankind. But every one being obliged to trade with others, only as far as it can without being wanting to itself; and, in fine, as the whole depends on the judgment each state shall form of what it can and ought to do in particular cases; nations can make sure only of generalities, the liberty which belongs to each for trading, being founded on imperfect rights depending on the judgment of another, are consequently always uncertain. Therefore if they are for securing to themselves something constant, punctual and determined treaties are the means by which they must procure it.

§ 27.
General
rule con-
cerning
these trea-
ties.

A nation having a full right to regulate itself in commercial affairs by what is useful or advantageous, it may make such commercial treaties as it shall think proper; and no other has a right to take offence, provided these treaties do not affect the perfect rights of another. If by the engagements contracted, a nation unnecessarily, or without powerful reasons, and renders itself incapable of joining in the general trade which nature recommends betwixt nations, it trespasses against its duty. But the nation being the sole judge of this (Prelim. § 16.) others, in regard to natural liberty, are to acquiesce, and even suppose that it acts on good reasons. Therefore every treaty of commerce, not affecting the perfect right of another, is allowable among nations, and the execution thereof not to be opposed. But that alone is in itself just and commendable which, as far as is possible and reasonable in the particular case, is transacted with a tenderness for the general interest.

§ 28.
Duty of na-
tions in
making
these trea-
ties

As express promises and engagements should be inviolable, every wise and virtuous nation will be careful previously to examine and weigh a treaty of commerce before the concluding, that

that it may not thereby be engaged to any thing contrary to the duties it owes itself and others.

Nations may in their treaties insert such clauses and conditions as they think proper; they are at liberty to make them perpetual or temporary, or dependent on certain events. It is usually most prudent not to engage for ever, as junctures may afterwards intervene by which the treaty might become very oppressive to one of the contracting parties. A precarious right only may be granted by a treaty, the nation reserving the liberty of revoking it at pleasure. We have already noticed (Book I. § 94.) that a simple permission, nor neither a long custom (Ibid. § 95.) gives any perfect right to a trade. Thus these things are not to be confounded with treaties; not even with those giving only a precarious right.

When once a nation has entered into engagements by treaty, it is no longer at liberty to do, in favour of others, contrary to the tenour of the treaty, what it might otherwise have granted to them agreeably to the duties of humanity, or to the general obligation of reciprocal commerce; being to do for others no more than what is in its power. Having deprived itself of the liberty of disposing of a thing, that thing is no longer in its power. Therefore when a nation has engaged to another that it will sell only to them certain goods or provisions; as for instance, corn; it can no longer carry them for sale to another market. The case is the same in a contract to purchase certain goods only of that nation.

But it will be asked, how and on what occasions a nation may enter into engagements which cancel the liberty of fulfilling its duties with others? As the duties towards oneself are to take place before the duties to others, if a nation finds its safety and real advantage in a treaty of this nature, unquestionably such a treaty is lawful: and the more, as it thereby makes no breach in the general commerce of nations; it only causes one branch of its trade to pass through other hands; or it ensures to a particular people such things as they want. If a state which stands in need of salt can secure a supply of it from another, by engaging to sell its corn and cattle only to this other nation, who will doubt but it has a right to conclude so salutary a treaty? Its corn or cattle are goods which it disposes of for supplying its own wants. But from what we have observed (§ 28.) these kind of engagements are not to be entered into, without very good reasons. However, be the reasons good or bad, the treaty is still valid, and other nations have no right to oppose it (§ 27.)

Every one is at liberty to recede from his right; a nation may lay a restriction on its commerce in favour of another, engage not to traffic in a certain kind of goods, forbear trading with such and such a country, &c. And in departing from such engagements, it acts against the perfect right of the nations with which it has contracted; and the latter has a right of bringing it to reason. The natural liberty of trade is not hurt by treaties of

§ 29.
Perpetual
or temporal
treaties are
revokable
at pleasure.

§ 30.
Nothing
contrary to
the tenour
of a treaty
can be
granted to a
third party.

§ 31.
How lawful
to deprive
oneself by
treaty of
trading
with an-
other na-
tion.

§ 32.
A nation
may abridge
its com-
merce in fa-
vour of an-
other.

this nature; for this liberty consists only in every nation being unmolested in the right of trading with those who consent to traffic with it: every one remaining free to close with or decline a particular commerce as it shall judge most advantageous.

§ 33.
May appropriate a trade to itself.

Nations carry on trade not only to procure things for necessity, use, conveniency, and delight; but they likewise make it a fund of opulence. Now on an occasion of gain, all are equally allowed to endeavour for a pact; but the most diligent, very lawfully prevents the others by taking possession of an advantage, which lies open to the first occupier; he may even secure the whole entirely to himself, if he has any lawful way of appropriating it. Thus if a nation alone produces certain things, another may lawfully procure itself by treaty the advantage of being the only buyer; and then sell them again all over the world. And it is indifferent to nations from what hand they receive the commodities they want, provided the price be reasonably equal, and the monopoly of this nation does not clash with the general duties of humanity, unless it avails itself of this advantage, for setting an exorbitant price on its goods. Should it abuse its monopoly to an immoderate gain, this would be an offence against the law of nature, as by such an exaction it deprives other nations of a necessary or agreeable product which nature designed for all men; yet no wrong is done, because strictly speaking, and according to external right, the owner of a commodity may either keep it, or set what price he pleases on it. Thus the Dutch, by a treaty with the king of Ceylon, have engrossed the cinnamon trade into their hands; yet whilst they keep their profits within just limits, no nation has any cause of complaint.

But did the question relate to commodities necessary to life, and the monopolizer was for raising them to an excessive price, other nations would be authorized by the care of their own safety, and the advantage of human society, to join in bringing an avaricious oppressor to reasonable terms. The right to necessities is very different from that to things adapted only to conveniency and delight, which, if they are too highly raised, we can safely go without. It would be absurd that the subsistence and being of nations should depend on the caprice or avidity of one.

§ 34.
Of consuls.

Among the modern institutions for the utility of commerce, one of the most useful is that of consuls or persons residing in the large trading cities, and especially in foreign sea-ports, with a commission empowering them to attend to the rights and privileges of their nation, and to terminate misunderstandings and contests among its merchants. When a nation trades largely with a country, it is requisite to have there a person charged with such a commission, and as the state which allows of this commerce must naturally favour it; so for the same reason it is likewise to admit a consul. But there being no absolute and perfect obligation to this, the nation disposed to have a consul, must procure itself this right by the very treaty of commerce.

The

The consul being charged with the affairs of his sovereign, continues accountable for his actions, and subject to him.

The consul is no public minister (as will appear by what we shall say of the character of ministers, in our fourth book,) and cannot pretend to the privileges appertaining to such character. Yet bearing his sovereign's commission, and being in this quality received by the prince in whose dominions he resides, he is, in a certain degree, entitled to the protection of the law of nations. This sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary in the proper discharge of his functions, without which the admission of the consul would be insignificant and deceptive. His functions first require, that he be not a subject of the state where he resides; as, then he would be obliged in all things to conform to its orders, and thus not be at liberty to acquit himself of the duties of his post.

They seem to require that the consul should be independent of the ordinary criminal of justice of the place where he resides, so as not to be molested or imprisoned, unless he himself violates the laws of nations by some enormous misdemeanour.

And though the importance of the consular functions be not such as to procure to the consul's person the inviolability and absolute independence enjoyed by public ministers; yet being under the particular protection of the sovereign who employs him, and instructed with his concerns, if he commits any crime, he is, from the respect due to his master, to be sent home in order for punishment. This is the conduct of states who are inclined to preserve a good understanding; but the surest way is, expressly to settle all these things in a treaty of commerce.

Wicquefort, in his treatise of *The Ambassador*, Book I. § V. says that consuls do not enjoy the protection of the law of nations, and that both in civil and criminal cases they are subject to the justice of the place where they reside. But the very instances he cites contradict his proposition. The states-general of the United Provinces, whose consul had been affronted and put under arrest by the governor of Cadiz, complained of it to the court of Madrid as a breach of the laws of nations. And in the year 1634, the republic of Venice was near coming to a rupture with pope Urban VIII. on account of the insult done to the Venetian consul by the governor of Ancona. The governor suspecting this consul to have given an information detrimental to the commerce of Ancona, after putting several indignities on him, caused his papers and the best part of his furniture to be carried off, and himself to be summoned, declared guilty of contumacy, and banished under pretence that, contrary to public prohibition, he had caused goods to be unloaded in a time of contagion. This consul's successor he likewise imprisoned; but, by the mediation of the ministers of France who interposed to prevent an open rupture, the pope obliged the governor of Ancona to make the republic satisfaction.

In the want of treaties, custom is to be the rule on this occasion;

caſion ; for a prince receiving a conſul without expreſs conditions, is ſuppoſed to receive him on the footing eſtabliſhed by cuſtom.

C H A P. III.

Of the Dignity and Equality of Nations, of Titles, and other Marks of Honour.

§ 35.
Of the dignities of nations or ſovereign ſtates.

EVERY nation, every ſovereign and independent ſtate, deſerves conſideration and reſpect, becauſe it makes an immediate figure in the grand ſociety of the human race, is independent of all earthly power, and is an aſſemblage of a great number of men who are, doubtleſs, more conſiderable than any individual. The ſovereign repreſents his whole nation, he unites in his perſon all its majeſty. No individual, though ever ſo free and independent, can be placed in competition with the ſovereign ; this would be to put a ſingle perſon alone upon an equality with an united multitude of his equals. Nations and ſovereigns, are then, at the ſame time under an obligation, have a right to maintain their dignity, and to cauſe it to be reſpected as of the utmoſt importance to their ſafety and tranquillity.

§ 36.
Of their equality.

We have already obſerved (Prelim. § 18.) that nature has eſtabliſhed a perfect equality of rights between independent nations. Conſequently none can naturally pretend to prerogative : their right to freedom and ſovereignty renders them equals.

§ 37.
Of precedence.

And ſince precedence or pre-eminence of rank is a prerogative, no nation, no ſovereign can attribute it to himſelf naturally and of right ; why ſhould nations who have no dependence on him, yield to him any thing in ſpite of themſelves ? However, as a powerful and vaſt ſtate is much more conſiderable in the univerſal ſociety, than a ſmall ſtate, it is reaſonable, that this laſt ſhould yield to it on occaſions where one muſt yield to the other, as in an aſſembly, and ſhew it thoſe mere ceremonial deferences, which, in reality, do not deſtroy their equality, and only ſhew a priority of order, a firſt place among equals. Others will naturally attribute this firſt place to the moſt powerful, and it would be as uſeleſs as ridiculous, for the weaker obſtinately to contend about it. The antiquity of the ſtate on theſe occaſions, alſo enters into conſideration : a new comer cannot diſpoſſeſs a perſon of the honour he has enjoyed, and he muſt produce very ſtrong reaſons, before he can cauſe himſelf to be preferred.

§ 38.
The form of government is foreign to this queſtion.

The form of government is naturally foreign to this queſtion. The dignity, the majeſty, reſides originally in the body of the ſtate ; that of the ſovereign is derived from his repreſenting the nation. Has the ſtate more or leſs dignity according as it is governed by a ſingle perſon, or by many ? At preſent kings claim a ſuperiority of rank over republics ; but this pretenſion has no

other support, than the superiority of their strength. Formerly, the Roman republics considered all kings as very far beneath them : but the monarchies of Europe finding none but weak republics, have disdained to admit them to an equality. The republic of Venice, and that of the United Provinces have obtained the honours of crowned heads ; but their ambassadors give place to those of kings.

In consequence of what we have just established, if the form of government in a nation happens to be changed, it will preserve the same honours and rank of which it was before in possession. When England had driven out her king, Cromwell would not suffer any thing to be abated of the honours that had been paid to the crown, or to the nation ; and he every where knew how to maintain the English ambassadors in the rank they had always possessed.

If treaties or a constant custom founded on a tacit consent, have established rank, it is necessary to conform to it. To dispute with a prince the rank he has acquired in this manner, is to do him an injury, since it is giving him a mark of contempt, or violating engagements that secure to him a right. Thus the partitions improperly made in the house of Charlemagne having given the empire to the eldest ; the youngest who had the kingdom of France, yielded to him the more easily, as there remained at that time a recent idea of the true majesty of the Roman empire. His successors followed what they found established ; they were imitated by the other kings of Europe, and thus the imperial crown became, without opposition, in possession of the first rank in Christendom. Most of the other crowns have not agreed among themselves about their rank.

Some would have the precedence of the emperor appear something more than the first place among equals, they attribute to him a superiority over all kings, and in a word make him the temporal head of Christendom *. And it in fact appears, that many emperors have thought of the like pretensions ; as if by reviving the name of the Roman empire, that they could also revive its rights. The other states have been on their guard against these pretensions. We may see in Mezeray † the precautions taken by king Charles V. when the emperor Charles IV. went into France, “for fear, says the historian, that this prince, and his son the king of the Romans, should found some right of superiority on his courtesy.” Bodinus relates ‡, that the French took offence at the emperor Sigismund’s placing himself in the royal seat in full parliament, and at his having conferred on de Beaucaire the title of chevalier le Senechal, adding, that to cover the remarkable fault they had committed in suffering it, they would not allow the same emperor,

* Bartolus went so far as to say, that all those were heretics, who did not believe that the emperor was lord of the whole earth. See Bodinus’s Republic, Book I. Chap. IX. p. m. 119.

† History of France, explication of the medals of Charles V.

‡ In his Republic, p. 138.

when

at Lyons, to make the count of Savoy a duke. At present the king of France, would doubtless think, that he was wanting to himself, if he discovered the least thought that another might claim any authority in his kingdoms.

§ 41.
Of the
name and
honours
given by the
nation to its
conductor.

A nation may grant to its conductor what degree of authority, and what rights it thinks proper : it is equally free in regard to the name, the titles, and honours with which it would decorate him. But it is agreeable to its wisdom, and of importance to its reputation, not to deviate in this respect, too much from the customs commonly received among civilised nations. Let us still observe that it ought to be directed there by prudence to proportion titles and honours to the power of its superior, and to the authority with which it would invest him. Titles and honours, it is true, determine nothing ; they are vain names, and vain ceremonies, when they are ill-placed : but who does not know the influence they have on the thoughts of men ? This is then a more serious affair than it appears at first glance. The nation ought to take care not to debase itself before other states, and not to degrade its conductor by too low a title : it ought to be still more careful not to swell his heart with a vain name, by unbounded honours ; so as to make him conceive the thoughts of arrogating to himself a power answerable to them, or to acquire a proportionable power by unjust conquests. On the other hand, an important title may engage the conductor to support with greater firmness the dignity of a nation. Conjectures determine the prudence which observes in every thing a just proportion. “ Royalty, says a respectable author, who may be believed on this subject, drew the house of Brandenburg from that yoke of servitude in which the house of Austria then kept all the German princes. This was a bait which Frederic III. threw to all his posterity, and by which he seemed to say, I have acquired a title, do you render yourselves worthy of it ; I have laid the foundations of your grandeur, it is you who are to finish the work *.”

§ 42.
If a sovereign may
attribute to
himself
what title
and honours he
pleases.

If the conductor of the state is sovereign, he has in his hands the rights and authority of the political society, and consequently, he may himself ordain what title, and honours ought to be paid him, unless the fundamental laws have determined them ; or the fixed limitations of his power do not manifestly oppose those he would attribute to himself. His subjects are obliged to obey him in this, as in whatever he commands in virtue of a lawful authority. Thus the czar Peter I. from the vast extent of his dominions, took upon himself the title of emperor.

§ 43.
The right
of other
nations in this
respect.

But foreign nations, are not obliged to give way to the will of a sovereign, who assumes a new title, or to a people who call their conductor by what name they please.

§ 44.
Of their
duty.

However, if this title has nothing unreasonable or contrary to received customs, it is altogether agreeable to the mutual duties which binds nations together, to give to a sovereign or conductor

* *Memoirs of the House of Brandenburg.*

of the state, the same title that is given him by his people. But if this title is contrary to custom, if it supposes what is not to be found in him who affects it, foreign nations may refuse it without his having reason to complain. The title of majesty is consecrated by custom to monarchs who command great nations. The emperors of Germany have long pretended to reserve it to themselves as belonging solely to the imperial crown. But the kings asserted with reason, that there was nothing on earth more eminent or more august than their dignity : they therefore refused the title of majesty to him who refused it to them * ; and at present, except in a few instances, founded on particular reasons, the title of majesty is properly attributed to the quality of king.

As it would be ridiculous for a little prince to take the title of king, and to cause that of majesty to be given him ; foreign nations, by refusing to comply with this fancy, do nothing but what is conformable to reason and their duty. However, if a sovereign is any where found, who, notwithstanding the small extent of his power, is accustomed to receive from his neighbours the title of king, the distant nations who would trade with him, cannot refuse him that title. It is not for them to reform the customs of distant regions.

The sovereign who would constantly receive certain titles and honours from other powers, ought to be assured of it by treaties. Those who have entered into engagements in this manner are obliged to conform to them, and cannot deviate from the treaty without doing him an injury. Thus in the examples we have lately given, the Czar, and king of Prussia took care to negotiate beforehand with the courts in friendship with them, to secure their being acknowledged under the new rank they resolved to assume.

§ 45.
How they
may secure
titles and
honours.

The popes have formerly pretended that it belonged to the tiara alone to create new crowns ; they dared even to hope, that the superstition of the princes and the people, would allow them so sublime a prerogative. But it vanished at the revival of letters, as spectres disappear at the rising of the sun †. The emperors of Germany, who have formed the same pretensions, had, at least, on their side, the example of the ancient Roman emperors. They only want the same power in order to have the same right.

In want of treaties, we ought to conform to the title, and, in general, to all the marks of honour that have been established by custom, and generally received. A resolution to deviate from them with respect to a nation or sovereign, when there is no particular reason for it, is to shew him contempt or ill-will : a conduct

§ 46.
They ought
to conform
to general
custom.

* At the famous treaty of Westphalia, the plenipotentiaries of France agreed with those of the emperor, that the king and queen writing with their own hand to the emperor, and giving him the title of majesty, he should answer them with his own hand with the same title. Letters of the plenipotentiaries to M. de Bienne, Oct. 15, 1646.

† Catholic princes receive still from the pope, titles that relate to religion. Benedict XIV. gave that of most faithful to the king of Portugal, and they have been pleased not to stop at the commanding style in which the bull is expressed. It is dated December 23, 1748.

equally

equally contrary to sound politics, and to what nations owe each other.

§ 47.
Of the natural respect which sovereigns owe to each other.

The greatest monarch ought to respect in every sovereign the eminent character with which he is invested. The independence, the equality of nations, the reciprocal duties of humanity, all unite to shew the respect due to this quality of the conductor of even a small nation. The weakest state is composed of men as well as the most powerful, and our duties are the same towards all those who do not depend on us.

But this precept of the law of nature does not extend beyond what is essential to the respect which independent nations owe to each other; in a word, to what shews that they acknowledge a state or its sovereign to be truly independent and sovereign, and consequently, worthy of every thing due to that quality. Moreover a great monarch being, as we have already observed, a very important personage in human society, it is natural for them to render him, in every thing that is not merely ceremonial, and does not injure the equality of the rights of nations; the honours to which a little prince cannot pretend: and this last cannot refuse to the monarch all the respect that does no injury to his own independence and sovereignty.

§ 48.
How a sovereign ought to maintain its dignity.

Every nation, every sovereign, ought to maintain his dignity (§ 35.) by causing the respect to be paid to it which is his due, and especially not to suffer that any stain be cast upon it. If he has then, titles and honour that belong to him according to constant custom, he may require them; and he ought to do it, on occasions where his glory is concerned.

But it is proper to distinguish, between negligence on the omission of what ought to be done according to commonly received custom, and positive acts of disrespect and insult. The prince may complain of negligence, and if it is not repaired may consider it as a mark of bad disposition: he has a right to demand, even by force of arms, the reparation of an insult. The Czar Peter I. complained in his manifesto against Sweden, for not having fired the cannon on his passage to Riga. He might think it strange that they did not pay him this mark of respect, and he might complain of it; but to make this the cause of a war, was being extremely prodigal of human blood.

C H A P. IV.

Of the Right to Security, the Effects of the Sovereignty, and the Independence of Nations.

§ 49.
Of the right of security.

IN vain does nature prescribe to nations, as well as to individuals, the care of their self-preservation, and of advancing their own perfection and happiness, if it does not give them a right to preserve themselves from every thing that can render this care ineffectual. This right is nothing more than a moral power of acting,

acting, that is, the power of doing what is morally possible; what is proper and conformable to our duties. We have then in general the right of doing whatever is necessary to the discharge of our duties. Every nation, as well as every man has therefore a right not to suffer any other to obstruct its preservation, its perfection, and happiness, that is, to preserve itself from all injuries (§ 18.) and this right is perfect, since it is given to satisfy a natural, and indispensable obligation; for when we cannot use constraint, in order to cause our right to be respected, the effect is very uncertain. It is this right of preservation from all injury that is called the *right of security*.

It is safest to prevent the evil, when it can be done. A nation has a right to resist an injurious attempt, and to make use of force and every honest means against the power that is actually engaged in opposition to it, and even to anticipate its machinations, always observing, not to attack it upon vague and uncertain suspicions, in order to avoid exposing itself to become an unjust aggressor.

When the evil is done, the same right of security authorises the offended to endeavour to obtain a complete reparation, and if necessary, to employ force for that purpose.

In short, the offended has a right to provide for his security for the future, and to punish the offender, by inflicting upon him a pain capable of deterring him afterwards from the like attempts, and of intimidating those who shall be tempted to imitate him. He may even, if necessary, put the aggressor out of the condition to injure him. He makes use of his right in all these measures, when guided by reason; and if any evil results from it to him who lays him under the necessity of acting thus, he can accuse none but his own injustice.

If then there is any where a nation of a restless and mischievous disposition, always ready to injure others, to traverse their designs, and to raise domestic troubles; it is not to be doubted, that all have a right to join, in order to repress, chastise, and put it ever after out of its power to injure them. Such should be the just fruits of the policy which Machiavel praises in Cæsar Borgia. The conduct followed by Philip II. king of Spain was adapted to unite all Europe against him; and it was from just reasons that Henry the Great formed the design of humbling a power, formidable by its forces, and pernicious by its maxims.

The three preceding propositions, are so many principles, that furnish various foundations for a just war, as we shall see in its proper place.

It is a manifest consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another state. Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which others ought the most scrupulously to respect, if they would not do it an injury.

The

§ 50.

It produces the right of resistance.

§ 51.

And that of obtaining reparation.

§ 52.

And the right of punishing.

§ 53.

The right of all the people against a mischievous nation.

§ 54.

No nation has a right to interfere in the government of another state.

§ 55.
One sovereign cannot make himself the judge of the conduct of another.

The sovereign is he to whom the nation has trusted the empire, and the care of the government: it has invested him with its rights; it alone is directly interested in the manner in which the conductor it has chosen, makes use of his power. It does not then belong to any foreign power to take cognizance of the administration of this sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it. If he loads his subjects with taxes, and if he treats them with severity, it is a national affair, and no other is called upon to redress it, or to oblige him to follow more wise and equitable maxims. It is for prudence to point out the occasions when a foreign prince may make him officious and amicable representations. The Spaniards violated all rules, when they set themselves up for judges of the Inca Athualpa. If that prince had violated the law of nations with respect to them, they would have had a right to punish him. But they accused him of having put some of his subjects to death, of having had several wives, &c. Things, for which he was not at all accountable to them; and what gave the finishing stroke to their extravagant injustice, they condemned him by the laws of Spain*.

§ 56.
How it is permitted to enter into the quarrel between a sovereign and his subjects.

But if the prince attacking the fundamental laws, gives his subjects a legal right to resist him; if tyranny become insupportable, obliges the nation to rise in their defence; every foreign power has a right to succour an oppressed people who implore their assistance. The English justly complained of James II. The nobility and the most distinguished patriots resolved to put a check on his enterprises, which manifestly tended to overthrow the constitution, and to destroy the liberties and the religion of the people, and therefore applied for assistance to the United Provinces. The authority of the prince of Orange had, doubtless, an influence on the deliberations of the states-general; but it did not make them commit injustice: for when a people from good reasons take up arms against an oppressor, justice and generosity require, that brave men should be assisted in the defence of their liberties. Whenever therefore a civil war is kindled in a state, foreign powers may assist that party which appears to them to have justice on their side. He who assists an odious tyrant, he who declares for an unjust and rebellious people offends against his duty. When the bands of the political society are broken, or at least suspended between the sovereign and his people, they may then be considered as two distinct powers; and since each is independent of all foreign authority, nobody has a right to judge them. Either may be in the right, and each of those who grant their assistance may believe that he supports a good cause. It follows then, in virtue of the voluntary law of nations (see Prelim. § 21.) that the two parties may act as having an equal right, and behave accordingly, till the decision of the affair.

* Garcillasso de la Véga.

But we ought not to abuse this maxim for authorising odious proceedings against the tranquillity of states. It is a violation of the law of nations to persuade those subjects to revolt, who actually obey their sovereign, though they complain of his government.

The practice of nations is conformable to our maxims. When the German protestants came to the assistance of the reformed in France, the court never undertook to treat them otherwise than as common enemies, and according to the laws of war. France at the same time assisted the Netherlands, which took up arms against Spain, and did not pretend that her troops should be considered upon any other footing than as auxiliaries in a regular war. But no power avoids complaining of an atrocious injury, if any one attempts by his emissaries to excite his subjects to revolt.

As to those monsters who, under the title of sovereigns, render themselves the scourges and horror of the human race; these are savage beasts, from which every brave man may justly purge the earth. All antiquity has praised Hercules for delivering the world from an Antæus, a Busris, and a Diomedes.

After having established this truth, that foreign nations have no right to intrude themselves into the government of an independent state, it is not difficult to prove, that this state has a right of refusing to suffer it. To govern itself according to its pleasure, is a necessary part of its independence. A sovereign state cannot be constrained in this respect, except it be from a particular right which the state itself has given to others by treaties; and even in this case, in a subject of such importance as that of government, this right cannot be extended beyond the clear and express terms of the treaties. Without this circumstance, a sovereign has a right to treat as enemies those who endeavour to interfere, otherwise than by their good offices, in his domestic affairs.

Religion is, in every sense, of great importance to a nation, and one of the most interesting subjects on which the government can be employed. An independent people is, with respect to their religion, accountable to none but God; they have a right to conduct themselves, in this respect, as in all others, according to the light of conscience, and not to suffer any foreigner to interfere in an affair of so delicate a nature. The custom long kept up in Christendom of causing all the affairs of religion to be decided and regulated in a general council, could only be introduced by the singular circumstance of the submission of the whole church to the same civil government, the Roman empire. When that empire was overthrown, and gave place to many independent kingdoms, this custom was found contrary to the first elements of government, to the idea of independent states, and political societies. It was, however, long supported by prejudice, ignorance, and superstition, by the authority of the popes, and the power of the clergy, and even respected at the time of the Re-

§ 57.
The right
of not suf-
fering for-
eign
powers to
interfere in
the affairs
of govern-
ment.

§ 58.
Of these
rights with
respect to
religion.

formation. The states who had embraced it, offered to submit to the decisions of an impartial council lawfully assembled. At present, they boldly declare, that they depend on no power on earth, either with respect to religion or civil government. The general and absolute authority of the pope and council is absurd in every other system than that of those popes who resolved to make all Christendom one single body, of which they pretended to be the supreme head*. Thus even catholic sovereigns have endeavoured to restrain this authority within such limits as are consistent with their supreme power; they do not receive the decrees of the councils and the popes bulls, till after they have caused them to be examined; and these ecclesiastical laws are of no force in their dominions, without the consent of the prince. We have sufficiently established in the first book of this work, Chap. XII. the rights of a state in matters of religion, and we refer to them here, only to draw just consequences from them with respect to the conduct which nations ought to observe with regard to each other.

§ 59.
No nation
can be con-
strained
with re-
spect to re-
ligion.

It is then certain, that no one can interfere in opposition to the will of a nation, in its religious affairs, without violating its right, and doing it an injury. Much less is any one allowed to employ force of arms to oblige it to receive a doctrine and a worship which he considers as divine. What right have men to proclaim themselves the defenders and protectors of the cause of God? He always knows how, when he pleases, to lead the nations to the knowledge of himself, by more certain means than those of violence. Persecutors make no true converts. The monstrous maxim of extending religion by the sword, is a subversion of the law of nations, and the most terrible scourge of kingdoms. Every madman believes he fights the cause of God, and every ambitious man covers himself with this pretence. While Charlemagne spread fire and sword through Saxony, to plant Christianity there, the successors of Mahomet ravaged Asia and Africa, to establish the koran.

§ 60.
Of the office
of humanity
on the sub-
ject of mis-
sionaries.

But it is an office of humanity to labour by mild and lawful means to persuade a nation to receive a religion that is believed to be the only one that is true and salutary. Missionaries may be sent to instruct the people, and this care is altogether conformable to the attention which every nation owes to the perfection and happiness of others. But it must be observed, that not to do any injury to the rights of a sovereign, the missionaries ought to abstain from preaching clandestinely, or without his permission, a new doctrine to his people. He may refuse to allow them the liberty of discharging their office, and if he orders them to leave his dominions, they ought to obey. They have need of a very express order from the King of kings for disobeying lawfully a sovereign who commands according to the extent of his power:

* See above § 146. and Bodinus's Republic, Book I. Chap. XX. with his citations, p. m. 139.

and the prince who shall not be convinced of this extraordinary order of the Deity, will do no more than exert his authority, by punishing a missionary for disobedience. But if the nation, or a considerable part of the people, are desirous of keeping the missionary, and following his doctrine, we have established elsewhere the rights of the nation and those of the citizens (Book I. § 128—136.) where this difficulty is fully answered.

The subject is very delicate, and we cannot authorise an inconsiderate zeal for making profelytes, without endangering the tranquillity of all nations, and without exposing, even those who are engaged in making converts, to act inconsistently with their duty, at the very time when they believe they are accomplishing the most meritorious work. For it is certainly performing a very bad office to a nation, and doing it an essential injury, to spread in the heart of it, a false and dangerous religion. Now there is no person who does not believe, that his religion alone is true and safe. Recommend, kindle in all hearts the ardent zeal of the missionaries, and you will see Europe overflowed with lamas, bonzes, and dervises, while the monks of all kinds will spread over Asia and Africa; protestant ministers will defy the inquisition in Spain and Italy, while the jesuits will spread themselves among the protestants in order to bring them back into the pale of the church. Let the catholics reproach the protestants as much as they please with their lukewarmness, the conduct of the last is more agreeable to reason, and the law of nations. True zeal applies itself to the task of making a holy religion flourish in the countries where it is received, and of rendering it useful with respect to the manners of the people and to the state; waiting the dispositions of providence, for an invitation from foreign nations, or for a very evident divine mission to preach it abroad, while it finds employment enough in its own country. Let us add, that in order lawfully to undertake to preach a religion to the various people in the world, it is necessary that they should be first informed of its truth by the most serious examination. But why! Do Christians doubt of their religion? The Mahometan entertains no doubt of his. Be always ready to take advantage of your knowledge; represent clearly, and with sincerity, the principles of your belief, to those who desire to hear you, instruct, persuade by evidence; but seek not to draw by the fire of enthusiasm: it is enough for each of us to act consistently with our own conscience: do this and none will be refused the light, and a turbulent zeal will not trouble the peace of nations.

When a religion is persecuted in one country, the foreign nations who profess it may intercede for their brethren: but this is all they can lawfully do, unless the persecution be carried to an intolerable excess; then indeed it becomes a case of manifest tyranny, in which all nations are permitted to succour an unhappy people (§ 56.). A regard to their own safety may also authorise them to undertake the defence of the persecuted. A king of

§ 61.
Circum-
spectio
ought to be
used.

What a so-
vereign
may do in
favour of
those who
profess his
religion in
another
France state.

France replied to the ambassadors who solicited him to suffer his reformed subjects to live in peace, that he was master in his kingdom. But the protestant sovereigns, who saw a conspiracy of all the catholics obstinately bent on their destruction, were also masters with respect to the succouring men who might strengthen their party, and help them to preserve themselves from the ruin with which they were threatened. There is no longer any question to be made in relation to the distinction between different states and nations, when it is become necessary to unite against madmen, who would exterminate all those who do not implicitly receive their doctrines.

C H A P. V.

Of the Observation of Justice between Nations.

§ 63.
The necessity of the observation of justice in human society.

JUSTICE is the basis of all society, the sure bond of all commerce. Human society, far from being an intercourse of assistance and good offices, would be no longer any thing but a vast scene of robbery, if no respect was paid to this virtue, which secures every one in the possession of his property. It is more necessary still between nations, than between the individuals; because injustice has more terrible consequences in the quarrels of these powerful bodies politic, and it is more difficult to obtain redress. The obligation imposed on all men to be just, is easily shewn to be a law of nature: we suppose it here to be sufficiently known, and content ourselves with observing, that nations are not only obliged to perform it (Prelim. § 5.) but that it is still more sacred with respect to them, from the importance of its consequences.

§ 64.
The obligation of all nations to cultivate and observe justice.

All nations are then strictly obliged to cultivate justice with respect to each other, to observe it scrupulously, and carefully to abstain from every thing that may violate it. Every one ought to render to others what belongs to them, to respect their rights, and to leave them in the peaceable enjoyment of them.

§ 65.
The right of not suffering injustice.

From this indispensable obligation which nature imposes on nations, as well as on all those who are bound to practise it towards each other, results the right of every state, not to suffer any of its privileges to be taken away, or any thing which lawfully belongs to it; for in opposing this, it acts in conformity to all its duties, and therein consists the right (§ 49.)

§ 66.
This right is perfect.

This right is perfect, that is, accompanied with the right of using force to make it observed. In vain would nature give us a right not to suffer injustice; in vain would it oblige others to be just with respect to us, if we could not lawfully make use of force, when they refused to discharge this duty. The just would be at the mercy of fraud and injustice, and all their rights would soon become useless.

From

From whence arises, as from so many branches, first, the right of a just defence, which belongs to every nation; or the right of making use of force against whoever attacks it, and its privileges. This is the foundation of a defensive war. § 67.
It produces
1. The right
of defence.

Secondly, the right to obtain justice by force, if we cannot obtain it otherwise, or to pursue our right by force of arms. This is the foundation of an offensive war. § 68.
2. The right
of doing
ourselves
justice.

Known injustice is, doubtless, a species of injury. We have then a right to punish it, as we have shewn above, in speaking of injuries in general (§ 52.). The right of not suffering injustice is a branch of the right of security. § 69.
The right
of punishing
the unjust.

Let us apply to the unjust, what we have said above (§ 53.) of a mischievous, or maleficent nation. If there be any that makes an open profession of trampling justice under foot, of despising and violating the right of others, whenever it finds an opportunity, the interest of human society will authorise all others to unite in order to humble and chastise it. We do not here forget the maxim established in our preliminaries, that it does not belong to nations to usurp the power of being judges of each other. In particular cases, liable to the least doubt, it ought to be supposed that each of the parties may have some right: and the injustice of that which has committed the injury, may proceed from error, and not from a general contempt of justice. But if by constant maxims, and by a continued conduct, one nation shews that it has evidently this pernicious disposition, and that it considers no right as sacred, the safety of the human race requires that it should be suppressed. To form and support an unjust pretension, is to do an injury, not only to him who is interested in this pretension, but to mock at justice in general, and to injure all nations. § 70.
The right
of all na-
tions
against one
that openly
despises in-
justice.

C H A P. VI.

Of the Concern a Nation may have in the Actions of its Citizens.

WE have seen in the preceding chapter, what are the duties common to nations with respect to each other, how they ought mutually to respect each other, and to abstain from all injury, and all offence, and how justice and equity ought to reign among them in their whole conduct. But we have not hitherto considered the actions of the body of the nation, of the state, of the sovereign. Private persons, who are the members of one nation, may offend and ill-treat the citizens of another, and may injure a foreign sovereign: it is for us to examine, what share a state may have in the actions of its citizens, and what are the rights and obligations of sovereigns in this respect. § 71.
The sove-
reign ought
to revenge
the injuries
of the state
and to pro-
tect the ci-
tizens.

Whoever offends the state, injures its rights, disturbs its tranquillity, or does it a prejudice in any manner whatsoever, declares himself its enemy, and puts himself in a situation to be justly punished.

nished for it. Whoever uses a citizen ill, indirectly offends the state, which ought to protect this citizen, and his sovereign should revenge the injuries, punish the aggressor, and, if possible, oblige him to make entire satisfaction; since otherwise the citizen would not obtain the great end of the civil association, which is safety.

§ 72.
We ought
not to
suffer his
subjects to
offend other
nations or
their citi-
zens.

But on the other hand, the nation or the sovereign ought not to suffer the citizens to do an injury to the subjects of another state, much less to offend the state itself. And that not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature, which forbids all injuries; but also because nations ought mutually to respect each other, to abstain from all offence, from all abuse, from all injury, and, in a word, from every thing that may be of prejudice to others. If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he does no less injury to that nation, than if he injured them himself. In short, the safety of the state, and that of human society, requires this attention from every sovereign. If you let loose the reins of your subjects against foreign nations, these will behave in the same manner to you; and instead of that friendly intercourse, which nature has established between all men, we should see nothing but one nation robbing another.

§ 73.
We ought
not to im-
pute to a
nation the
faults of
individu-
als.

However, as it is impossible for the best regulated state, or for the most vigilant and absolute sovereign, to model at his pleasure all the actions of his subjects, and to confine them on every occasion, to the most exact obedience, it would be unjust to impute to the nation, or to the sovereign, all the faults of the citizens. We ought not then to say in general, that we have received an injury from a nation, because we have received it from one of its members.

§ 74.
Unless it
approves
or ratifies
them.

But if a nation, or its leader, approves and ratifies the fact committed by a citizen, it makes the act its own: the offence ought then to be attributed to the nation, as the author of the true injury, of which the citizen is, perhaps, only the instrument.

§ 75.
The con-
duct to ob-
served by
the offend-
ed.

If the offended state keeps the guilty in his power, he may, without difficulty, punish him, and oblige him to make satisfaction. If the guilty escape and returns into his own country, justice may be demanded from his sovereign.

§ 76.
The duty
of the ag-
gressor's so-
vereign.

And since this last ought not to suffer his subjects to molest the subjects of others, or to do them an injury, much less should he permit them audaciously to offend foreign powers: he ought to oblige the guilty to repair the damage, if that be possible, to inflict on him an exemplary punishment, or, in short, according to the nature of the case, and the circumstances attending it, to deliver him up to the offended state, there to receive justice. This is pretty generally observed with respect to great crimes, or such as are equally contrary to the laws, and the safety of all nations. Assassins, incendiaries, and robbers, are seized every where, at the desire of the sovereign in the place where the crime

was committed, and delivered up to his justice. They go still farther in the states that are more strictly related by friendship and good neighbourhood: in the case of those who commit common crimes they are prosecuted by the civil power, and obliged to make reparation, or to suffer a slight civil punishment; the subject of two neighbouring states are reciprocally obliged to appear before the magistrate of the place, where they are accused of having failed in their duty, upon a requisition of that magistrate, called Letters Rogatory, they are cited according to law, and obliged to appear before their own magistrates: an admirable institution, from which many neighbouring states live together in peace, and seem to form only one republic! This is in force throughout all Switzerland. As soon as the Letters Rogatory are prepared in form, the superior of the accused ought to let them take effect; it is not for him to know whether the accusation be true or false; he ought to presume on the justice of his neighbour, and not to break, by his distrust, an institution so proper to preserve good harmony between them: however, if by constant experience he finds that his subjects are disturbed by the neighbouring magistrates, who call them before their tribunals, he is doubtless permitted to think of the protection he owes to his people, and to refuse the rogatories till they have given him a reason for the abuse, and entirely removed it. But he also is to alledge his reasons, and to set them in a fair light.

The sovereign who refuses to cause a reparation to be made of the damage caused by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it. But if he delivers up, either the goods of the guilty, or makes a recompence, in cases that will admit of reparation, or the person, to render him subject to the penalty of his crime, the offended has nothing farther to demand from him. King Demetrius having delivered to the Romans those who had killed their ambassador, the senate sent them back, resolving to reserve to themselves the liberty of punishing that crime by revenging it on the king himself, or on his dominions*. If this was really the case, and if the king had no share in the assassination of the Roman ambassador, the conduct of the senate was very unjust, and only worthy of men who sought a pretence to cover their ambitious enterprises.

In short, there is another case where the nation in general, is guilty of the base attempt of its members. This is when by its manners, or the maxims of its government, it accustoms and authorises its citizens to plunder, and use ill foreigners indifferently, or to make inroads into the neighbouring countries, &c. Thus the nation of the Usbecks is guilty of all the robberies committed by

§ 77.

If he refuses justice, he takes upon himself a share of the fault and offence.

§ 78.

Another case in which the nation is guilty of the crimes of the citizens.

* See Polybius, quoted by Barbeyrac, in his notes on Grotius, Book III. Chap. XXIV. § VII.

the individuals of which it is composed. The princes whose subjects are robbed and massacred, and whose lands are infested by these robbers, may justly punish the entire nation. What do I say? All nations have a right to enter into a league against such a people, to repress them, and to treat them as the common enemies of the human race. Christian nations have no less a right to unite against the barbarous republics, in order to destroy those haunts of pirates, among whom the love of plunder, or the fear of a just chastisement, are the only rules of peace and war. But the corsairs have the prudence to respect those who are most able to chastise them; and the nations who know how to enjoy freely a rich commerce, are not sorry at its being out of the power of others.

CHAP. VII.

Of the Domain in regard to different Nations.

§ 79.
General effect of the domain.

WE have explained in Chap. XVIII. Book I. how a nation possesses a country and occupies its domain and government. This country, with every thing included in it, becomes the property of the nation in general. Let us now see what are the effects of this property, with respect to other nations. The full domain is necessarily a proper and exclusive right: for if I have a full right to dispose of a thing as I please, it follows from thence, that others have no right to it at all; since if they had any, I could not freely dispose of it. The particular domain of the citizens may be limited and restrained several ways by the laws of the state, as it always is by the eminent domain of the sovereign; but the general domain of the nation is full and absolute, since its authority over the land cannot be limited: it excludes all right on the part of strangers. And as the rights of a nation ought to be respected by all others (§ 64.) none can pretend to any with respect to the country that belongs to that nation, nor ought to dispose of it, without its consent, any more than of every thing else contained in the country.

§ 80.
What is comprehended in the domain of a nation.

The domain of the nation extends to every thing it possesses by a just title: it comprehends its ancient and original possessions, and all its acquisitions made by means just in themselves, or received as such by nations; concessions, purchases, conquests made in a war carried on in form, &c. And by its possessions, we ought not only to understand its lands, but all the rights it enjoys.

§ 81.
The goods of the citizens, are the goods of the nation, with respect to foreign nations.

The goods even of the individuals in their totality ought to be considered as the goods of the nation, in regard to other states. They, in some sort, really belong to it from the right it has over the goods of its citizens, because they make a part of the sum total of its riches, and augment its power; and because the nation has an interest in the protection it owes to its members. In short, it cannot be otherwise, since nations act and treat together in a body in their quality of political societies, and are considered as so many moral persons. All those who form a society, a nation, being con-

considered by foreign states, as making only one whole, one single person: all their wealth together can only be considered as the wealth of that same person. And this is so true, that each political society may, if it pleases, establish a community of goods, as Campanella did in his republic of the sun. Others will not enquire, what it does in this respect: its domestic regulations make no change in its rights with respect to strangers, nor in the manner in which they ought to consider the totality of its goods in what way soever they are possessed.

From an immediate consequence of this principle, if a nation has a right to any part of the goods of another, it has a right indifferently to the goods of the citizens of that part, till the discharge of the obligation. This maxim is of great use, as shall be afterwards shewn. § 82.
In consequence of this principle.

The general domain of the nation over the lands it inhabits is naturally connected with the empire: for establishing itself in a vacant country, the nation, certainly, did not pretend to have the least dependence there on any other power: and how should an independent nation avoid having authority at home? Thus we have already observed (Book I. § 205.) that in possessing a country, the nation is presumed to possess at the same time its government. We shall here proceed farther, and shew the natural connection of these two rights in an independent nation. How should it govern itself at its pleasure in the country it inhabits, if it cannot truly and absolutely dispose of it? And how should it have the full and absolute domain of the place in which it has no command? Another's sovereignty, and the right it comprehends, must take away its freedom of disposal. Add to this, the eminent domain which constitutes a part of its sovereignty (Book I. § 244.) and you will the better perceive the intimate connection there is between the domain and the empire of the nation. Thus what is called the *high domain*, which is nothing but the domain of the body of the nation, or of the sovereign who represents it, is every where considered as inseparable from the sovereignty. The *useful domain*, or the domain reduced to the rights that may belong to a particular person in the state, may be separated from the empire: and nothing prevents the possibility of its belonging to a nation, in places that are not under its obedience. Thus many sovereigns have fiefs, and other properties, in the lands of another prince: they therefore possess them in the manner of individuals. § 83.
The connections of the domain of the nation with the sovereignty.

The empire united to the domain, establishes the jurisdiction of the nation in its territories, or the country that belongs to it. It is that, or its sovereign, who is to exercise justice in all the places under his obedience, to take cognizance of the crimes committed, and the differences that arise in the country. § 84.
Of jurisdiction.

Other nations ought to respect this right. And as the administration of justice necessarily requires that every definitive sentence, regularly pronounced, be esteemed just, and executed as such; as soon as a cause in which foreigners find themselves interested, has been decided in form, the sovereign of the defendants can-

cannot hear their complaints. To undertake to examine the justice of a definitive sentence, is to attack the jurisdiction of him who has past it. The prince ought not then to interfere in the causes of his subjects in foreign countries, and to grant them his protection, excepting in the cases of a refusal of justice, palpable and evident injustice, a manifest violation of rules and forms; or, in short, an odious distinction made to the prejudice of his subjects, or of foreigners in general. The court of England has established this maxim, with great strength of evidence, on occasion of the Prussian vessels seized and declared good prizes during the last war*. What is here said has no relation to the merit of that particular cause, since it depended on facts.

§. 85
Effects of
the jurisdic-
tion in
foreign
countries.

In consequence of these rights of jurisdiction, the decisions made by the judge of the place within the extent of his power ought to be respected, and to be in force among foreigners. For example, the judge of the domicile is to nominate tutors and guardians for minors and idiots. The law of nations, which has an eye to the common advantage and the good harmony of nations, will then have this nomination of a tutor or guardian be valid, and acknowledged in all countries where the pupil may have any concern. Use was made of this maxim in the year 1672, even with respect to a sovereign. The Abbé of Orleans, sovereign prince of Neufchatel in Switzerland, being incapable of managing his own affairs, the king of France gave him for a guardian, his mother the duchess dowager Longueville. The duchess of Nemours, the sister of that prince, pretended to the guardianship for the principality of Neufchatel: but the title of the duchess of Longueville was acknowledged by the three states of the country. Her advocate founded her right on that princess's being established guardian by the judge of the place†. This was applying a just principle very ill: the domicile of the prince could be no where but in his state, and the authority of the duchess of Longueville became firm and lawful at Neufchatel, only by the decree of the three states, who alone had a right to chuse a guardian for their sovereign.

In the same manner the validity of a testament, as to its form, can only be decided by the judge of the domicile, whose sentence delivered in form ought to be every where acknowledged. But without affecting the validity of the testament itself, the bequests contained in it may be disputed before the judge of the place where the effects are situated, because those effects can only be disposed of conformably to the laws of the country. Thus the same Abbé of Orleans we have just mentioned, having appointed the Prince of Conti his universal legatee, the three states of Neufchatel gave the investiture of the principality to the duchess of Nemours, without staying till the parliament of Paris

* See the report made to the king of Great Britain by Sir George Lee, Dr. Paul, Sir Dudley Ryder and Mr. Murray. This is an excellent piece on the law of nations.

† *Memoirs of Mad. the Duchess of Longueville*: 1670.

had pronounced their decision on the question of two testaments opposed to that of the Abbé of Orleans : declaring that the sovereignty was unalienable. Besides, it might still be said on this occasion, that the domicil of the prince could be no where but in the state.

Every thing included in the country belonging to the nation, and nobody besides itself, or he to whom it has devolved its right, being able to dispose of it (§ 79) ; if it has left uncultivated and desert places in the country, no person whatsoever has a right to take possession of them without its consent. Though it does not make actual use of them, these places belong to it ; it has an interest in preserving them for future use, and ought not to be accountable to any person for the manner in which it makes use of its property. 'Tis proper to recollect here, what we have observed above (Book I. § 81) ; no nation can lawfully appropriate to itself a too disproportioned extensive country, and reduce other nations to want subsistence, and a place of abode. A German chief in the time of Nero said to the Romans, "As heaven belongs to the Gods, so the earth is given to the human race : desert countries are common to all * : " by which he would let his proud conquerors know, that they had no right to reserve and appropriate to themselves a country which they left desert. The Romans had laid waste a chain of countries along the Rhine to cover their provinces from the incursions of the barbarians. This German's remonstrance would have had a good foundation, had the Romans pretended to keep without reason a vast country which was of no use to them : but these lands which they would not suffer to be inhabited, serving as a rampart against savage nations, were of extraordinary use to the empire.

§ 86.
Of deserts
and uncultivated
places.

When there is not this singular circumstance, it is equally agreeable to the dictates of humanity, and to the particular advantage of the state, to give these desert places to strangers who are willing to clear the land and to render it valuable. The beneficence of the state thus turns to its own advantage ; it acquires new subjects, and augments its riches and power. This is the practice in America ; and by this wise method, the English have carried their settlements in the new world to a degree of power, which has considerably increased that of the nation. Thus the king of Prussia also endeavours to repeople his states laid waste by the calamities of ancient wars.

§ 87.
The duty of
the nation
in this respect.

The nation that possesses a country is at liberty to leave in the primitive communion certain things that have not yet had a master, or of appropriating to itself the right of possessing those things, as well as any other advantage for which that country is convenient. And as such a right is of use, it is, doubtless, presumed, that the nation reserves it to itself. It belongs to it then, to the

§ 88.
Of the right
of possessing
things that
have not
yet found
a master.

* *Sicut talum Diis, ita terras generi mortalium datas ; quæque vacuæ, eas publicas esse.*
Tacit.

exclusion of strangers, unless its laws expressly declare otherwise, as those of the Romans, which left wild beasts, fish, &c. in the primitive communion. No foreigner has then a natural right to hunt or fish in the territories of the state, to appropriate to himself a treasure found there, &c.

§ 89.
Rights
granted to
other na-
tions.

Nothing hinders a nation, or sovereign, if the laws permit, to have the power of granting several privileges in his territories to another nation, or in general to strangers; every one being able to dispose of his property, as he thinks proper. Thus several sovereigns in the Indies have granted to the trading nations of Europe the right of having factories, forts, and even fortresses and garrisons in places within their dominions. We may in the same manner give the right of fishing in a river, or on the coast, that of hunting in the forests, &c. and when once these rights have been validly ceded, they constitute a part of the possessions of him who has acquired them, and ought to be respected in the same manner as his ancient possessions.

§ 90.
It is not al-
lowable to
drive a na-
tion out of
a country
which it in-
habits.

Whoever agrees that robbery is a crime, and that we are not allowed to seize by force the goods of another, will acknowledge, without any other proof, that no nation has a right to chase another people from the country they inhabit, in order to settle in it themselves: for notwithstanding the extreme inequality to be found in climates and lands, every people ought to be contented with that which is fallen to their share. Will the conductors of nations despise a rule that constitutes all their safety in civil society? Let this sacred rule be entirely forgotten, and the peasant will quit his thatched cottage to invade the palaces of the great, or the delightful possessions of the rich. The ancient Helvetians, discontented with their native soil, burnt all their habitations, and marched forward, sword in hand, to settle in the fertile countries on the south of Gaul. But they received a terrible lesson from a conqueror more able, and still less just, than they: Cæsar defeated them, and sent them back into their own country. Their posterity, however, more wise than they, confined their views to the preservation of the lands, and the independence they had received from nature; they lived contented, and the labour of free hands counter-balanced the sterility of the soil.

§ 91.
Nor extend
by violence
the bounds
of empire.

There are conquerors who, aspiring after nothing but enlarging the bounds of their dominions, without driving out the inhabitants from the country, content themselves with subduing them: a violence less barbarous, but not less unjust: in sparing the wealth of the individuals, they seize all the rights of the nation, and the sovereign.

§ 92.
The limits
of territories
ought to be
carefully
settled.

Since the least usurpation over the territory of another is an injustice; in order to avoid being exposed to it, and to prevent every subject of discord, every occasion of quarrel, the limits of territories ought to be marked out with clearness and precision. If those who drew up the treaty of Utrecht had applied on so important a subject all the attention it deserved, we should not see France and England in arms, in order to decide

by

by a bloody war, what are the bounds of their possessions in America: but some obscurity, some uncertainty, is often designedly left in conventions, to furnish the means of a rupture. An unworthy artifice in a transaction wherein good faith alone ought to preside! We have also seen commissaries endeavour to surprise or corrupt those of a neighbouring state unjustly, to gain for their master some leagues of territory. How can princes or ministers allow themselves in practices that would dishonour a private man?

They ought not only to be far from usurping the territory of another; they should also respect it, and abstain from every act contrary to the rights of the sovereign: for a foreign nation can claim no right to it (§ 79.) They cannot then, without doing an injury to the state, enter sword in hand into his territories in pursuit of a criminal, and take him from thence. This is at the same time injuring the safety of the state, and offending against the rights of the empire, or the supreme authority of the sovereign. This is what is called a violation of territory; and among nations there is nothing more generally acknowledged as an injury that ought to be repelled with vigour, by every state that would not suffer itself to be oppressed. We shall make use of this principle in speaking of war, which gives occasion for many questions on the rights of territory.

The sovereign may forbid the entrance of his territory either in general, to every stranger, or in a particular case, or to certain persons, or on account of certain affairs, according as he shall find it most for the advantage of the state. There is nothing in all this, that does not flow from the rights of the domain and the empire: every one is obliged to pay a respect to the prohibitions; and he who dares to violate it, incurs the penalty decreed to render it effectual. But the prohibition ought to be known, as well as the penalty annexed to the disobedience: those who are ignorant of it, ought to be informed when they make their appearance, in order to enter the country. Formerly the Chinese, fearing lest the commerce of strangers should corrupt the manners of the nation, and make an alteration in the maxims of a wise, but singular government, forbade all people entering the empire: a prohibition that was not at all inconsistent with justice, provided they did not refuse the succour required by humanity, to those whom a tempest or some necessity obliged to appear on their frontiers. It was salutary to the nation, without injuring the rights of others, or even the duties of humanity which permit us, in case of competition, to prefer ourselves to others.

If two or many nations discover and possess at the same time an island or any other desert land without a master, they ought to agree between themselves, and make an equitable partition; but if they cannot agree, each will have the right of empire and domain of the parts in which they first settled.

An

§ 66.
Of a land
possessed by
a private
person.

An independent private person, whether he has been driven from his country, or whether he has legally quitted it of himself, may settle in a country which he finds without a master, and there possess an independent domain. Whoever would afterwards make himself master of the entire country, could not do it with justice, without respecting the rights and independence of this person. But if he himself finds a sufficient number of men who are willing to live under his laws, he may form a new state within the country he has discovered, and possess there both the domain and the empire. But if this private person arrogates to himself alone an exclusive right to a country, in order to be a monarch there without subjects, people will justly laugh at his vain pretensions: a foolish and ridiculous possession can produce no real right.

There are also other means by which a private person may found a new state. Thus in the eleventh century, some gentlemen of Normandy founded a new empire in Sicily, after having conquered it from the common enemies of Christendom. The custom of the nation permitted the citizens to quit their country, in order to seek their fortune elsewhere.

§ 97.
Independent fami-
lies in a
country.

When many independent families are settled in a country, they possess the free domain, but without empire, since they do not form a political society. Nobody can seize the empire of this country: since this would be to make these families subjects in spite of themselves, and no man has a right to command men who are free born, if they do not voluntarily submit to him.

If these families have fixed settlements, the place each possesses properly belongs to that family: the rest of the country, of which they make no use, being left in the primitive communion, belongs to the first possessor. Whoever would settle there, may lawfully take possession of it.

Families wandering in a country, as the nations of shepherds who pass over it, according as their wants require, possess it in common; it belongs to them exclusively of all other nations, and we cannot without injustice deprive them of the countries that are appropriated to their use. But let us here recollect what we have said more than once (Book I. § 81, and 209. Book II. § 86.), the Indians of North America had no right to appropriate all that vast continent to themselves: and provided that people are not reduced to want land, others might, without injustice, settle in some parts of a region which they were not in a condition to inhabit entirely. If the Arabian shepherds resolved carefully to cultivate the land, a less space might be sufficient for them. In the mean time, no other nation has a right to reduce their bounds, unless it be under an absolute want of land. For, in fine, they possess their country, they make use of it after their manner, they reap from it an advantage suitable to their manner of life, and in which they receive laws from no one. In a case
of

of pressing necessity, I think, people may, without injustice, settle in a part of this country, on teaching the Arabs the means of rendering it, by the cultivation of the earth, sufficient for their wants, and those of the new inhabitants.

It may happen that a nation may be contented with possessing only certain places, or appropriating to itself certain rights in a country that has not a master, and be little desirous of possessing the whole country. In this case, another may take what the first has neglected; but this cannot be done without allowing them an entire and absolute independence with respect to all the rights acquired by the first. In this case, it is proper that a regulation should be made by a convention, and this is seldom omitted among civilized nations.

§ 98.
Possession of certain places only, or of certain rights in a vacant country.

C H A P. VIII.

Rules with respect to Foreigners.

WE have already treated (Book I. § 213.) of the inhabitants, or of the men who reside in a country where they are not citizens. We shall only treat here of the strangers who pass or sojourn in a country for the management of their affairs, or in a quality of mere travellers. The relation that subsists between them and the society in which they are found, the ends for which they travel and reside there, the duties of humanity, the rights, the interest, and the safety of the state which receives them, the rights of that to which they belong; all these circumstances, combined and applied according to cases and circumstances, serve to determine the conduct that ought to be observed toward them, which constitutes right and duty, with regard to them. But the intention of this chapter is not so much to shew what humanity and justice require towards strangers, as to establish the rules of the law of nations on this subject; rules tending to secure the rights of each, and to hinder the repose of nations being disturbed by the quarrels of individuals.

§ 99.
The general idea of the conduct the state ought to observe towards strangers.

Since the lord of the territory may forbid its being entered when he thinks proper (§ 94.) he has, doubtless, a power to make the conditions on which he will admit of it. This, as we have already said, is a consequence of the right of domain. Can it be necessary to add, that the master of the territory ought here to respect the duties of humanity? 'Tis the same with respect to all rights; the proprietor may freely use them, and he does no injury to any person by making use of them; but if he would be free from all guilt, and keep his conscience pure, he will never make any other use of them but such as is most conformable to his duty. We speak here in general of the rights which belong to the lord of the country, reserving for the following chapter the examination of the cases in which he cannot refuse an entrance into his territory;

§ 100.
Of the entering the territory.

ritory; and we shall see in Chap. X. how his duty towards all mankind on other occasions obliges him to permit the passage into, and a residence in, his state.

If the sovereign annexes some particular conditions to the permission of entering into his territories, it ought to be done in such a manner, that strangers may be informed of it, when they present themselves on the frontier. There are states, as China, and Japan, into which all foreigners are forbid to penetrate, without an express permission: but in Europe the access is every where free to every person who is not an enemy of the state, except in some countries to vagabonds.

§ 101.
Strangers
are subject
to the laws.

But even in the countries where every stranger freely enters, the sovereign is supposed to allow him access, only upon this tacit condition, that he be subject to the laws; I mean the general laws made to maintain good order, and which have no relation to the title of citizen, or of subject of the state. The public safety, the rights of the nation, and of the prince, necessarily require this condition; and the stranger tacitly submits to it, as soon as he enters the country, as he cannot presume on having access upon any other footing. The empire has the right of command in the whole country, and the laws are not confined to regulating the conduct of the citizens among themselves; but they determine what ought to be observed by all orders of people throughout the whole extent of the state.

§ 102.
And pun-
ishable ac-
cording to
the laws.

In virtue of this submission, the strangers who commit a fault ought to be punished according to the laws of the country. The end of pains and penalties is to render the laws respected, and to maintain order and safety.

§ 103.
Who is the
judge of
their dis-
putes.

From the same reason, the disputes that may arise between the strangers, or between a stranger and a citizen, ought to be terminated by the judge of the place, and also according to the laws of the place. And as the dispute properly arises from the refusal of the defendant, who pretends not to owe what is demanded of him; it follows from the same principle, that every defendant ought to be prosecuted before his judge, who alone has a right to constrain or condemn him. The Swifs have wisely made this rule one of the articles of their alliance, in order to prevent the quarrels that might arise from abuses that were formerly too frequent in relation to this subject. The defendant's judge is the judge of the place where this defendant has his domicile, or that of the place where the defendant is, when any sudden difficulty arises, provided it does not relate to an estate in land, or to a right annexed to such an estate. In this last case, as these possessions ought to be enjoyed according to the laws of the country where they are situated, and as the right of granting the possessions is vested in the superior of the country, the disputes relating to them can only be decided in the state on which they depend.

We have already shewn in (§ 84.) how the jurisdiction of a nation ought to be respected by the other sovereigns, and in what cases

cases only, they may interfere in the causes of their subjects in foreign countries.

The sovereign ought not to grant an entrance into his state to make strangers fall into a snare : as soon as he receives them, he engages to protect them as his own subjects, and to make them enjoy, as much as depends on him, an entire security. Thus we see that every sovereign, who has given an asylum to a stranger, considers himself no less offended by an injury that may be done to him, than he would be by an act of violence committed on his own subject. Hospitality was in great honour among the ancients, and even among barbarous nations, such as the Germans. Those savage people who treated strangers ill, that Scythian nation which sacrificed them to Diana *, were held in abhorrence by all nations ; and Grotius justly says † that their extreme ferocity cut them off from human society. All other nations had a right to unite their forces in order to chastise them.

From a sense of gratitude for the protection granted him, and the other advantages he enjoys, the stranger ought not to confine himself to the respect due to the laws of the country ; he ought to assist it upon occasion, and to contribute to its defence, as much as his being a citizen of another state may permit him. We shall see elsewhere what he can and ought to do, when the country is engaged in a war. But nothing hinders his defending it against pirates or robbers ; against the ravages of an inundation, or the devastations of fire. Can he pretend to live under the protection of a state, and to participate in a multitude of advantages, without doing any thing for its defence, and to be a tranquil spectator of the dangers to which the citizens are exposed ?

Indeed he cannot be subject to the taxes that have only a relation to the citizens ; but he ought to contribute his share to all the others. Being exempted from serving in the militia, and the tribute destined for the support of the rights of the nation, he will pay the duties imposed upon provisions, merchandise, &c. and, in a word, every thing that has only a relation to his residence in the country, or to the affairs which brought him thither.

The citizen or the subject of a state who absents himself for a time, without any intention to abandon the society of which he is a member, does not lose his privilege by his absence : he preserves his rights, and remains bound by the same obligations. Being received in a foreign country, in virtue of the natural society, the communication, and commerce, which nations are obliged to cultivate with each other, (Prelim. § 11. and 12. Book II. § 21.) he ought to be considered there, as a member of his own nation, and treated as such.

The state, which ought to respect the rights of other nations, and in general those of all mankind, cannot arrogate to itself any power over the person of a stranger, who does not become a subject by entering into the territory. The stranger cannot pretend

* The Taurians, see *Grotius de Jure Belli & Pacis*, Lib. II. Cap. XX. n. 7. §. XL.

† Ibid.

to enjoy the liberty of living in the country without respecting the laws : if he violates them, he is punishable as the disturber of the public peace, and being guilty with respect to society ; but he is not obliged to submit, like the subjects, to all the commands of the sovereign : but if such things are required from him as he is not willing to perform, he may quit the country. Free at all times to leave it, the people have no right to detain him, except for a time, and from very particular reasons ; as in a time of war, from the fear, lest knowing the state of the country, and the strong places, he should communicate his knowledge to the enemy. From the voyages of the Dutch to the East Indies we learn, that the kings of Corea forcibly detained the strangers who were shipwrecked on their coast ; and Bodinus assures us *, that a custom so contrary to the law of nations was practised in his time in Æthiopia, and even in Muscovy. This is wounding both the rights of private persons and those of the state to which they belong. Things have been greatly changed in Russia ; a single reign, that of Peter the Great, has placed that vast empire in the rank of civilized nations.

§ 109.
Nor of his
wealth.

The property of an individual does not cease to belong to him on account of his being in a foreign country, and it still is a part of the totality of the wealth of his nation (§ 81.) The pretensions which the lord of the territory might form in respect to the wealth of a foreigner would be then equally contrary to the rights of the proprietor, and to those of the nation of which he is a member.

§ 110.
Who are
the heirs of
a stranger.

Since the stranger remains still a citizen of his country, and a member of his own nation (§ 107.), the wealth he leaves at his death in a foreign country ought naturally to devolve to those who are his heirs according to the laws of the state of which he was a member. But this general rule does not prevent the immoveable effects following the disposition of the laws of the country where they are situated (see § 103).

§ 111.
Of the
testament of
a foreigner.

As the right of bequeathing by will, or of disposing of his fortune, in case of death, is a right resulting from property, it cannot, without injustice, be taken from a stranger. The stranger has then, by natural right, the liberty of making a will. But it is asked, by what laws he is obliged to regulate himself either in the form of his testament or in the disposal of his property ? 1. As to the form or solemnities appointed to settle the validity of a will, it appears that the testator ought to observe those that are established in the country where it is written, unless the laws of the state of which he is a member, otherwise ordain : in every case he will be obliged to follow the formalities the laws prescribe, if he would, with validity, dispose of the wealth he possesses in his own country. I speak here of a testament to be opened in the place where the person dies ; for if a traveller makes his will, and sends it sealed up into his own country, it is the same as if it had been written there, and ought to follow the laws of it. 2. As to the bequests them-

* In his Republic, Book I. Chap. VI.

selves, we have already observed, that those which relate to immoveables ought to be conformable to the laws of the country where those immoveables are situated. The foreign testator cannot dispose of the goods moveable or immoveable which he possesses in his own country, otherwise than in a manner conformable to the laws of the same country. But as to moveable goods, specie, and other effects which he possesses elsewhere, which he has with him, or which follow his person, we ought to distinguish between the local laws, that do not extend beyond the territory, and the laws that have a relation to the rank of a citizen. The stranger remaining a citizen of his country, he is always bound by these last laws, wherever his is placed, and he ought to conform to them in the disposal of his natural goods, and all his moveables whatsoever. The laws of this kind made in the country where he is placed, and of which he is not a citizen, are of no force with respect to him. Thus a man who makes his will, and dies in a foreign country, cannot deprive his widow of the part of his moveable effects assigned to that widow by the laws of the country. A Genevese obliged by the law of Geneva to leave a portion to his brothers or his cousins, if they are his next heirs, cannot deprive them of it by making his will in a foreign country, while he remains a citizen of Geneva: but the stranger dying at Geneva, is not obliged, in this respect, to conform to the laws of the republic. The case is quite otherwise with respect to local laws: they regulate what may be done in the territory, and do not extend beyond it. The testator is no longer subject to them when he is out of the territory, and they do not affect that part of his wealth which is also out of it. The stranger is obliged to observe these laws in the country where he makes his will, with respect to the goods he possesses there. Thus an inhabitant of Neuchatel, to whom intails are forbidden, in his country, with respect to the goods he possesses there, freely makes an intail of the estate he possesses out of the jurisdiction of the country, if he dies in a place where intails are allowed; and a foreigner making a will at Neuchatel could not make an intail of even the moveable goods he possesses there; if we might not always say, that his moveable goods are excepted by the spirit of the law.

What we have established in the three preceding sections, is sufficient to shew, with how little justice the treasury, in some states lays claim to the effects left there by a foreigner at his death. This practice is founded on what is called the right of *Escheatage*, by which foreigners are excluded from all inheritances in the state, either with respect to the goods of a citizen or to those of an alien, and therefore they cannot be constituted heirs by will, nor receive any legacy. Grotius justly observes, that this law was made in the ages when foreigners were almost considered as enemies *. When even the Romans were become a very polite and learned people, they could not accustom themselves to consider foreigners as men who

§ 112.
Of the right
of escheat-
age.

* *De Jure Belli & Pacis, Lib. II. Cap. VI. § 14.*

had a right to the same privileges as they themselves enjoyed. "The people, said Pomponius the civilian, with whom we have neither friendship, nor hospitality, nor alliance, are not our enemies: yet if the things that belong to us fall into their possession, and they are the proprietors of them, freemen become their slaves; and they are on the same terms with respect to us *." We must believe that so wise a people only preserved such inhuman laws from a necessary retaliation, as they could have no other reason for it, from barbarous nations with whom they had no connection nor any treaty. Bodinus shews † that the rights of *Escheatage* are derived from these worthy sources. It has been successively softened, or even abolished, in most civilized states. The emperor Frederic II. first abolished it by an edict, which permitted all foreigners dying within the limits of the empire, to dispose of their substance by testament, or if they died intestate, to have their nearest relations for heirs ‡. But Bodinus complains that this edict was but badly executed. Why does there still remain any vestiges of so barbarous a law in Europe, which is now so enlightened and so full of humanity? The law of nature cannot suffer it to be put in practice, but by way of retaliation. This is the use made of it by the king of Poland in his hereditary states: the right of *Escheatage* is established in Saxony: but the sovereign is so just and equitable, that he makes use of it only against the nations that consider the Saxons as subject to them.

§ 113.
The right
of foreign
duties.

The right of foreign duties is more conformable to justice and the mutual obligation of nations. We give this name to the right by virtue of which the sovereign retains a moderate part of the goods, either of the citizens or foreigners, sent out of his territories to pass into the hand of strangers. As the carrying away of these goods is a loss to the state, it may justly receive an equitable recompence.

§ 114.
Of immove-
ables pos-
sessed by an
alien.

Every state has the liberty of granting or refusing foreigners the power of possessing lands or other immoveable goods within its territory. If it grants them these privileges, these kind of possessions belonging to foreigners, remain subject to the jurisdiction, and the laws of the country, and to the same taxes as the rest. The government of the sovereign extends over the whole territory, and it would be absurd to except some parts from it, on account of their being possessed by foreigners. If the sovereign does not permit aliens to possess immoveables, nobody has a right to complain of it; for he may have very good reasons for acting in this manner; and strangers not being able to claim any right in his territories (§ 79.), they ought not to take it ill, that he makes use of his power and of his rights in the manner which he thinks most for the advantage of the state. And as the sovereign may refuse strangers the power of possessing immoveables, he is doubtless at liberty to grant it only on certain conditions.

* *Digest. Lib. XLIX. Tit. XV. De Captivis & Postlimin.* I make use of the president de Montesquieu's translation in his *Spirit of Laws*.

† His Republic, Book I. Chap. VI.

‡ *Ibid.*

Nothing

Nothing naturally hinders foreigners contracting marriage in the state. But if these marriages are found prejudicial or dangerous to a nation, it has a right, and it is even obliged to prohibit them, or to annex the permission of them to certain conditions; and as it belongs to the nation or its sovereign to determine what appears most for the welfare of the state, other nations ought to acquiesce in what is in this respect appointed in a sovereign state. Citizens are almost every where forbid to marry foreigners of a different religion; and in many places of Switzerland, a citizen cannot marry a foreign woman, unless he proves that she brings him in marriage a certain sum fixed by the law.

§ 115.
Marriages
of aliens.

C H A P. IX.

Of the Rights which belong to all Nations after the Introduction of Domain and Property.

IF obligation, as we have observed, gives a right to the things without which it cannot be fulfilled; every absolute, necessary, and indispensable obligation produces in this manner rights equally absolute, necessary, and that cannot be taken away. Nature imposes no obligations on men, without giving them the means of fulfilling them. They have an absolute right to the necessary use of these means: nothing can deprive them of this right, as nothing can dispense with their fulfilling their natural obligations.

§ 116.

What are
the rights of
which man-
cannot be
deprived.

In the primitive communion, men had, without distinction, a right to the use of every thing, so far as it was necessary to discharge their natural obligations. And as nothing could deprive them of this right, the introduction of domain and property could not take place without leaving to every man the necessary use of things; that is, the use absolutely required for the accomplishment of his natural obligations. We cannot then suppose them introduced without this tacit restriction, that every man preserves some right to the thing subjected to property, in the case where, without this right, he would remain absolutely deprived of the necessary use of things of this nature. This right is then a necessary remainder of the primitive communion.

§ 117.

Of the right
which re-
mains of the
primitive
commu-
nity.

The domain of nations does not then hinder every one having some right to that which belongs to others, in cases where they find themselves deprived of the necessary use of certain things, if the property of others absolutely exclude them. We ought carefully to weigh all the circumstances, in order to make a just application of this principle.

§ 118.

Of the right
mains to
each nation
with respect
to what be-
longes to
others.

I say the same of the *right of necessity*. We thus call the right which necessity alone gives to the performance of certain actions that are otherwise unlawful, when without these actions it is impossible to fulfil an indispensable obligation. We ought to take

§ 119.

Of the right
of necessity.

great care in this case, that the obligation be really indispensable, and the act relating to it, the only means of fulfilling this obligation. If either of these conditions are wanting, there is no right of necessity. We may see these subjects discussed in treatises on the law of nature, and particularly in that of Mr. Wolf. I confine myself here to exhibit in a few words the principles we have occasion for, in order to explain the rights of nations.

§ 120.
Of the right
of procur-
ing provi-
sions by
force.

The earth was designed to feed its inhabitants, and the property of one ought not to reduce him who is in the want of every thing, to die with hunger. When therefore a nation is in absolute want of provisions, it may oblige its neighbours, who have more than they want for themselves, to deliver them up at a just price, or even to take them by force, if they will not sell them. Extreme necessity revives the primitive communion, the abolition of which ought to deprive no person of the necessaries of life (§ 117). The same right belongs to individuals when a foreign nation refuses them a just assistance. Captain Bontekoe, a Dutchman, having lost his vessel at sea, saved himself in the shallop with a part of the crew, and landed on an Indian coast, where the barbarous inhabitants refusing him provisions, the Dutch obtained them sword in hand *.

§ 121.
Of the right
of making
use of the
things at
belong to
others.

In the same manner, if a nation has a pressing want of the vessels, waggons, horses, or even the labour of strangers, it makes use of them either by free consent or by force, provided that the proprietors are not under the same necessity. But as it has no more right to these things than necessity gives it, it ought to pay for the use it makes of them, if it be able to do it. The practice of Europe is agreeable to this maxim. Nations retain by force foreign vessels found in a port; but they pay for the advantage they reap from them.

§ 122.
Of the right
of carrying
off women.

Let us say a word on a more singular case, since authors have treated of it; a case in which at present people are never reduced to employ force. A nation can only preserve and perpetuate itself by propagation. A people have then a right to procure the women absolutely necessary to its preservation; and if its neighbours, who have more than they make use of for that purpose, refuse them, they may justly have recourse to force. We have a famous example of this in the rape of the Sabines †. But though a nation is allowed to procure for itself, even by force of arms, the liberty of obtaining young women in marriage, no particular young woman can be constrained in her choice, nor become, by right, the wife of her ravisher. Attention has not been paid to this by those who have decided without restriction, that the Romans did nothing unjust on this occasion ‡. It is true, that the Sabine women submitted to their fate with a good grace, and when their nation took up arms to revenge them, it sufficiently appeared, from the zeal with which they themselves rushed between the

* Bontekoe's Voyage, in the voyages of the Dutch to the East Indies.

† Tit. Liv. Lib. I.

‡ Wolfii. Jus. Gent. § 341.

combatants, that they freely acknowledged the Romans for their lawful husbands.

Let us say still, that if the Romans, as many pretend, were originally no more than a band of robbers united under Romulus, they did not form a true nation, or a just state: the neighbouring nations were then much in the right to refuse them women, and the law of nature, which approves no civil society but those that are just, did not require them to furnish that society of vagabonds and robbers with the means of perpetuating themselves: much less did it authorise them to procure these means by force. In the same manner, no nation was obliged to furnish the Amazons with males. That female state, if it ever existed, put itself, by its own fault, out of a condition to support itself without foreign assistance.

The right of passage is also a remainder of the primitive communion in which the entire earth was common to men, and the passage was every where free, according to their necessities; nobody could entirely deprive them of this right (§ 117.); but the exercise of it was limited by the introduction of domain and property: since that introduction, we can no otherwise make use of it than by respecting the proper rights of others. The effect of property is to make the advantage of the proprietor prevail over that of all others. When therefore the master of the territory thinks proper to refuse your entering into it, it is necessary that you should have some reason stronger than his, for entering it in spite of him. Such is the right of necessity: it permits your performing an action illicit on other occasions, that of not respecting the right of domain. When a true necessity obliges you to enter into the country of another; for example, if you cannot otherwise deliver yourself from an imminent danger, if you have no other passage for procuring the means of life, or those of satisfying some other indispensable obligation, you may force a passage that is unjustly refused. But if an equal necessity obliges the proprietor to refuse your entrance, he refuses it justly; and his right prevails over yours. Thus a vessel tost by a tempest, has a right to enter, even by force, into a foreign port. But if that vessel is infected with the plague, the master of the port may keep it at a distance, by discharging his cannon, and yet not offend either against justice, or even charity, which in such a case ought doubtless to begin at home.

The right of passage in a country would be often useless without that of procuring, at a just price, the things the person has occasion for: as we have already shewn (§ 120.) that we may, in case of necessity, take provisions even by force.

In speaking of exile and banishment, we have observed (Book I. § 229—231.) that every man has a right to inhabit some part of the earth. What we have shewn in respect to individuals, may be applied to whole nations; for if a people are driven from the place of their abode, they have a right to seek a retreat: the nation to which they address themselves ought then to grant them

§ 123.
Of the right
of passage.

§ 124.
And of procuring what
we want.

§ 125.
Of the right
of inhabiting a foreign country.

a place of habitation, and at least for a time, if it has not very important reasons to refuse them. But if the country inhabited by this nation is scarcely sufficient for itself, nothing can oblige it to admit strangers to settle there for ever: and even when it is not convenient to grant them a perpetual habitation, it may send them away. As they have the resource of seeking an establishment elsewhere, they cannot be authorised by the right of necessity to stay in spite of the master of the country. But it is necessary, in short, that these fugitives should find a retreat; and if every body refuses them, they may justly fix in the first country where they find land enough for themselves, without taking that cultivated by the inhabitants: but in this case, their necessity gives them only the right of habitation, and they ought to submit to all the tolerable conditions imposed upon them by the master of the country; as paying him tribute, becoming his subjects, or at least of living under his protection, and in certain respects depending on him. This right, as well as the two preceding, is a remainder of the primitive communion.

§ 126.
Of things,
the use of
which is in-
exhaustible.

We have sometimes been obliged to anticipate the subject of the present chapter, in order to follow the order of the different subjects that present themselves. Thus, in speaking of the open sea, we have remarked (Book I. § 281.) that thing, the use of which is inexhaustible, cannot fall under the domain or property of any one: because in that free and independent state in which nature has produced them, they may be equally useful to all men. Even the things which in other respects are subject to domain, if their use is inexhaustible, they remain common with respect to that use. Thus a river may be subject both to domain and empire; but in quality of running water it remains common; that is, the master of the river cannot hinder any one from drinking and drawing water out of it. Thus the sea, even in those parts that are occupied, being sufficient for the navigation of the whole world, he who has the domain, cannot refuse a passage through it to any vessel from which he has nothing to fear. But it may happen, by accident, that this inexhaustible use of the thing may be justly refused by the master, when advantage cannot be made of it, without incommoding him, or doing him a prejudice. For instance, if you cannot come to my river for water without passing over my land, and damaging the crop it bears, I may exclude you for that reason, from the inexhaustible use of the running water; and you lose it by accident. This leads us to speak of another right that has a great connection with this, and is ever derived from it; that is, the right of *innocent use*.

§ 127.
Of the right
of innocent
use.

We call *innocent use* or *innocent utility* that which may be derived from a thing without causing either loss or inconvenience to the proprietor; and the *right of innocent use* is the right we have to that use which may be drawn from things belonging to another, without causing him either loss or inconvenience. I have said that this right flows from the right to things, the use of which is inexhaustible. In fact, a thing that may be useful to

any

any one, without loss or inconvenience to the master, is, in this respect, an inexhaustible use; and for this reason the law of nature allows all men a right to it, notwithstanding the introduction of domain and property. Nature, who designs her gifts for the common advantage of men, does not allow of their being kept from their use, when they can be furnished with them without any prejudice to the proprietor, and by leaving still untouched all the utility and advantages he is capable of receiving from his rights.

This right of innocent use is not a perfect right, like that of necessity; for it belongs to the master to judge, if the use we would make of a thing that belongs to him will be attended with no damage and inconvenience. If others pretend to judge of it, and to force the proprietor, in case of refusal, he would be no longer master of his property. Frequently the use of a thing will appear innocent to him that would receive advantage from it, though in fact it is not so: and therefore to undertake to force the proprietor, is obliging him to commit injustice, or rather it is actually to commit it, since it is violating a right that belongs to him, of judging what he ought to do. In all cases susceptible of doubt, we have then only an imperfect right to the innocent use of things that belong to others.

But when the innocence of the use is evident, and absolutely indubitable, the refusal is an injury. For besides it's manifestly depriving him who demands the innocent use of his right, it shews, with respect to him, the injurious dispositions of hatred and contempt. To refuse a merchant-ship the passage into a strait, to fishermen the liberty of drying their nets on the banks of the sea, or to deny others the privilege of water out of a river, is visibly injuring their right to an innocent use. But in all cases, if we are not pressed by necessity, we may demand of the master the reasons of his refusal; and if he gives none, we may consider him as unjust, or as an enemy with whom we are to act according to the rules of prudence. In general, we should regulate our sentiments and conduct towards him, according to the greater or less weight of the reasons on which he acts.

All nations have then a general right to the innocent use of the things that are under any one's domain. But in the particular application of this right, it is for the proprietary nation to see whether the use that would be made of what belongs to it is truly innocent; and if it refuses, it ought to alledge its reasons; for it ought not to deprive others of their right through mere caprice. All this proceeds from right; and it must be remembered that the innocent use of things is not comprehended in the domain or the exclusive property. The domain gives only the right of judging in particular cases, whether the use is really innocent. Now he who judges ought to have his reasons, and he should mention them, if he would appear to judge, and not act from caprice or ill-nature. All this, I say, is of right: we are going to

§ 128.

Of the nature of this general right.

§ 129.

And in cases not doubtful.

§ 130.

Of the exercise of this right between nations.

to consider, in the following chapter, what are the duties of a nation with respect to what others prescribe in the use to be made of its rights.

C H A P. X.

How a Nation ought to use its Right of Domain, in order to discharge its Duties towards others, with respect to their innocent Use.

§ 131.
The general duty of the proprietor.

SINCE the law of nations treats, as well of the duties of states as of their rights, it is not sufficient to explain, on the subject of innocent use, what all nations have a right to require from the proprietor; we ought now to consider the influence of the duties towards others in the conduct of the same proprietor. As it belongs to him, to judge whether the use is really innocent, and whether it will be attended with no damage to himself, he should found his refusal on true and solid reasons. This is a maxim of equity: he ought not even to take this measure for trifles, for a slight loss, or some little inconvenience; humanity forbids this, and the mutual love which men owe to each other requires greater sacrifices. It would be certainly deviating too far from that universal benevolence which ought to unite the human race, to refuse a considerable advantage to a single person, or to a whole nation, when there would result from granting it an inconsiderable loss, or a small inconvenience to ourselves. A nation ought then, in this respect, to regulate itself on all occasions, from reasons proportioned to the advantages and necessities of others, and to reckon as nothing a small expence or supportable inconvenience, when great good will result from it to any other. But nothing obliges it to be at expence, or to throw itself into embarrassments to grant others a custom that will be neither necessary to them, nor very useful. The sacrifice we here require is not contrary to the interest of the nation. It is natural to think that the others will behave in the same manner in return; and what advantages will result from this, with respect to all states.

§ 132.
Of innocent passage.

Property cannot deprive nations of the general right of travelling over the earth in order to have a communication with each other, for carrying on trade, and other just reasons. The master of a country may only refuse the passage on particular occasions, where he finds it prejudicial or dangerous. He ought then to grant it for lawful causes, whenever he can do it without inconvenience to himself. And he cannot lawfully affix burthen-some conditions to a concession which he is obliged to perform, and which he cannot refuse who would discharge his duty, and not abuse his right of property. The count of Lupfen having improperly stopped some merchandise in Alsace, complaints were

car-

carried to the emperor Sigismund, who was then at the council of Constance; upon which that prince assembled the electors, princes, and deputies of towns, to examine the affair. The opinion of the Bourggrave of Nurembourg deserves to be mentioned: "God, said he, has created heaven for himself and his saints, and has given the earth to man, in order to make it of use to the poor and the rich. The roads are for their use, and God has not subjected them to any taxes." He condemned the count of Lupfen to restore the merchandise, and to pay costs and damage, because he could not justify his seizure by any particular law. The emperor approved this opinion, and passed sentence accordingly *.

But if the passage raises the apprehension of some danger, the state has a right to require sureties; he who would pass cannot refuse them, a passage being due to him, only so far as it is attended with no inconvenience. § 133.
Sureties may be required.

A passage ought also to be granted for merchandise; and as this may, in common, be done without inconvenience, to refuse it without just reason is injuring a nation, and endeavouring to deprive it of the means of carrying on a trade with other states. If this passage occasions any inconvenience, any expence for the preservation of canals and highways, it may be recompensed by the rights of toll (Book I. § 103.) § 134.
Of the passage of merchandise.

In explaining the effects of domain, we have said above, (§ 94, and 100.) that the master of the territory may forbid the entrance into it, or permit it on such conditions as he thinks proper: this external right then ought to be respected by strangers. But now we consider it under another view, relatively to the duties of the master, and to his internal rights: we say that he cannot, without particular and important reasons, refuse either the passage or an abode to strangers who desire it from just causes. For the passage or the abode, being in this case an innocent advantage, the law of nature does not give him a right to refuse it; and though other nations, and all men in general, are obliged to submit to his judgment, (§ 128, and 130.) he does not the less offend against his duty, if he refuses improperly: he then acts without any true right; nay he abuses his external right. He cannot, without some particular and pressing reason, refuse the residence of a stranger who comes with the hopes of recovering his health in the country, or to acquire instructions in the schools and academies. A difference in religion is not a sufficient reason to exclude him, provided he abstains from disputation; this difference not depriving him of the rights of humanity. § 135.
Of abode in the country.

We have seen, (§ 125.) how the right of necessity may arise, in certain cases, a people driven from the place of their residence, to settle in the territory of another nation. Every state ought, doubtless, to grant to so unhappy a people, that succour and assistance which it can bestow, without being wanting to it- § 136.
How people ought to act with respect to strangers who desire a perpetual residence.

self: but granting them an establishment in the land belonging to the nation, is a very delicate step, the consequences of which should be maturely considered by a conductor of the state. The emperors Probus, and Valens, found that they had done ill in having received into the territories of the empire numerous bands of Gepides, Vandals, Goths, and other barbarians*. If the sovereign finds that it would be too inconvenient and dangerous, he has a right to refuse an establishment to these fugitive people, or on receiving them, to take all the precautions that prudence can dictate to him. One of the safest will be, not to permit these strangers to dwell together in the same country, and to keep up there the form of a separate nation. Men who have not been able to defend their own country, cannot pretend to any right to establish themselves in the territory of another, in order to maintain themselves there as a nation in a body†. The sovereign who receives them may therefore disperse them, and distribute them into the towns and provinces wanting inhabitants. In this manner his charity will turn to his own advantage, to the increase of his power, and to the greatest benefit of the state. What a difference is there in Brandenburg since the settlement of the French refugees! The great elector Frederic William offered an asylum to these unfortunate people; he provided for their expences on the road, established them in his states at an expence that was truly royal: and this beneficent and generous prince merited the title of a wise and able politician.

§ 137.
Of the right
proceeding
from a ge-
neral per-
mission.

When by the laws, or custom of a state, certain actions are generally permitted to strangers, as for instance, travelling freely, and without an express permission in the country, marrying there, buying or selling merchandise, hunting, fishing, &c. one nation cannot be excluded from enjoying the general permission, without doing it an injury, unless there is some particular lawful reason for refusing to that nation what is granted indiscriminately to others. We should remember that the enquiry here is about actions of innocent use: and as the nation permits them to strangers without distinction, it makes known with sufficient plainness, that it thinks them innocent in relation to itself; and this is to declare, that strangers have a right to them, (§ 127.): the innocence is manifest by the confession of the state, and the refusal of an advantage that is manifestly innocent, is an injury (§ 129.) Besides, to forbid without any cause to one people, what is indifferently permitted to all, is an injurious distinction, since it can only proceed from hatred or contempt. If there is any particular well-founded reason for an exception, the thing is no longer an innocent use with respect to that people, and no injury is done to them. The state may also, by way of punishment, except

* *Vopiscus, Prob. C. x. viii. Amm. Mar. Lib. xx. i. Soerat. Hist. Eccles. Lib. iv. C. 28.*

† Caesar replied to the Tenederians and Usipetes, who were resolved to keep the land they had seized, that it was not just for them to invade the possessions of others, after their not being able to defend their own. *Neque verum esse, qui suos fines tueri non potuerint alienis occupare.* De Bello Gallico, Lib. IV. Cap. VIII.

from the general permission a people who have given it just cause of complaint.

As to rights of this nature granted to one or many nations for particular reasons, they are given to them in the form of benefits, by a convention, or out of gratitude, for some particular service; those to whom the same rights are refused, cannot consider themselves as offended. The nation cannot judge that such actions are an innocent use, since it does not permit them to every one indifferently; and it may, at pleasure, cede rights that belong to itself, without any person having cause of complaint, or of pretending to the same favour.

§ 138.
Of a right granted in form of a benefit.

Humanity is not confined to permitting foreign nations an innocent advantage which they may derive from what belongs to us; but it also requires that we should facilitate even the means of their improving it, so far as this can be done without injury to ourselves. Thus in a well regulated state, there are every where inns in which travellers may be assigned lodgings at a reasonable price, where the people will watch over their safety, and where they are treated with equity and humanity. A polite nation should give the kindest receptions to strangers, receive them with politeness, and on every occasion shew a disposition to serve them. By these means every citizen will discharge his duty with respect to all mankind, and will be of real service to his country. Glory is the certain reward of virtue, and the good-will attracted by an amiable character has often very important consequences, with respect to the state. No nation is in this respect more worthy of praise than the French: foreigners no where receive a more agreeable reception, and one more proper to hinder their regretting the immense sums they annually spend at Paris.

§ 139.
The nation ought to be courteous.

C H A P. XI.

Of Usucaption and Prescription among Nations.

LET us conclude what relates to domain and property with an examination of a celebrated question, on which the learned are much divided. It is asked, if *usucaption* and *prescription* may take place between independent nations and states?

Usucaption is the acquisition of domain founded on a long possession uninterrupted and undisputed; that is, on an acquisition solely proved by this possession. Wolf defines it, an acquisition of domain founded on a presumed desertion. His definition explains the manner in which a long and peaceable possession may serve to establish the acquisition of domain. Modestinus, *Digest. Lib. 3. de Usurp. & Usucap.* says, in conformity to the principles of the Roman law, that *usucaption* is the acquisition of domain from a continued possession during a time expressed by the law. These three definitions have nothing in them incompatible with each other, and it is easy to reconcile them by making an abstract of what relates to the civil law in the last. In the

§ 140.
The definition of usucaption and prescription.

first of these definitions we have endeavoured clearly to express the idea commonly affixed to the term *usucaption*.

Prescription is the exclusion of all pretensions to a right founded on the length of time during which it has been neglected; or, as Wolf defines it, the loss of a proper right in virtue of a presumed consent. This definition is just; that is, it explains how a long neglect of a right occasions its being lost, and it agrees with the nominal definition we give to *prescription*, and in which we explain what is commonly understood by this term. As to the rest, the term *usucaption* is but little used, and therefore we shall make use of that of *prescription*, whenever there is not an absolute necessity to employ the other.

§ 147.
That usucaption and prescription are derived from the law of nature.

Now to decide the question we have proposed, we must first see whether usucaption and prescription are derived from the law of nature; many illustrious authors have said and proved it*. Though in this treatise we frequently suppose the reader acquainted with the law of nature, it is proper to establish the decision, since the affair is disputed.

Nature has not herself established property with respect to wealth, and in particular with regard to lands; she only approves this introduction, for the advantage of the human race. It would be absurd then to say that domain and property being once established, the law of nature can secure to a proprietor any right capable of introducing disorder into human society. Such would be the right of entirely neglecting the thing that belongs to him, of leaving it during a long space of time, under all the appearances of being properly abandoned, or that does not belong to him, and of coming at length to deprive an honest possessor of it, who has perhaps acquired a title by burthened conditions, received it as an inheritance from his father, or as a portion with his wife, and who might have made other acquisitions, had he been able to know that this was neither solid nor lawful. Far from giving such a right, the law of nature prescribes to the proprietor the care of what belongs to him, and lays him under obligations to make known his right, that others may not be led into an error: for nature does not approve his property, and only secures it to him on these conditions. If he neglects this for a time long enough not to be admitted to reclaim it, without endangering the rights of others, the law of nature will not permit him to reclaim it. We ought not then to consider property as so extensive and secure a right, that it can be absolutely neglected during a long, space of time, notwithstanding all the inconveniences that may happen to human society by the proprietor resolving to make use of it, according to his caprice. Why does the law of nature order all to respect this right of property in him who possesses it, if it is not for the peace, safety, and advantage of human society? Nature must then, from the same reason, require that every proprietor, who for a long time, and without any just reason, neglects his right, should be presumed to have intirely renounced and aban-

* See Grotius de Jure Belli & Pacis, Lib. II. Cap. IV. Possessor Jus Nat. & Gent. X. et especially Wolfius Jus Nat. Par. III.

doned it. This is what forms the absolute presumption, or *juris & de jure* of its being abandoned, and upon which another is legally intitled to appropriate the thing abandoned to himself. The absolute presumption does not here signify a conjecture about the secret will of the proprietor; but a maxim which the law of nature ordains should be considered as true and stable, and this with a view of maintaining peace and order among men. It composes therefore a title as firm and just as that of property itself, established and supported by the same reasons. The honest possessor who had founded a presumption of this kind, has then a right approved by the law of nature; and this law, which requires that the right of every one should be firm and certain, does not permit their being disturbed in their possessions.

The right of *usucaption* properly signifies, that the honest possessor is not obliged to suffer his property to be disputed; he proves this by his possession itself, and he repulses the demand of the pretended proprietor, by prescription. Nothing can be more equitable than this rule. If the plaintiff was permitted to prove his property, he might happen to bring proof, that to appearance was extremely evident; but would only be so, from the loss of some writing, or some witness, who might have shewn how he had lost or conferred his right. Would it be reasonable for him to call in question the rights of the possessor, when by his fault he has suffered things to run into such a situation, that the truth is in danger of not being discovered? If it be necessary that one of the two should be exposed to lose his property, it is just it should be him who is in fault.

It is true, that if the honest possessor should discover, with entire certainty, that the plaintiff is the true proprietor, and that he never abandoned his right, he ought in conscience, and from an internal law, to restore all he has received belonging to the plaintiff. But this estimation is not easily made, and it depends on circumstances.

Prescription being only founded on an absolute or lawful presumption, it has no place, if the proprietor has not really neglected his rights. This condition implies three particulars: 1. That the proprietor cannot alledge an invincible ignorance; either on his own part, or on that of his friends. 2. That he cannot justify his silence by lawful and solid reasons. 3. That he has neglected his right, or kept silence during a considerable number of years; for the negligence of a few years, being incapable of producing confusion, and of rendering the respective right of the party doubtful, is not sufficient to found or authorise a presumption of his having abandoned it. It is impossible to determine by the law of nature the number of years required to found a prescription; this depends on the nature of the property disputed, and the circumstances of the case.

What we have remarked in the preceding section, relates to ordinary prescription. There is another called *immemorial*, because it is founded on immemorial possession: that is, on a possession, the origin of which is unknown, or so obscure, that it cannot

§ 142.
What is
required to
found the
ordinary
prescription.

§ 143.
Of prescription
immemorial.

cannot be proved whether the possessor had a real proprietary right, or whether he received the possession from another. This prescription *immemorial* secures the possessor's right, and it cannot be taken from him; for it is presumed that he has the right of a proprietor, while no solid reasons have been brought against him; and, indeed, from whence could these reasons be derived, when the origin of his possession is lost in the obscurity of time? It ought even to secure him from every pretension contrary to his right. What would be the case, were it permitted to call in question a right acknowledged time immemorial, when the means of proving it were destroyed by time? Immemorial possession is then a title not to be expunged, and immemorial prescription suffers no exception: both are founded on a presumption which the law of nature prescribes us to take for an incontestible truth.

§ 144. In the case of ordinary prescription, this cannot be opposed to him who alleges just reasons for his silence, as the impossibility of speaking, or a well-founded fear, &c. because there is then no longer any room for a presumption that he has abandoned his right. It is not his fault if people have thought they had a right to presume it, and he ought not to suffer by it; he cannot be refused the liberty of proving clearly his property. This method of defence against prescription, has been often employed against the princes whose formidable forces have long reduced to silence the weak, the victims of their usurpations.

§ 145. It is also very evident, that we cannot oppose prescription to the proprietor, who not being able actually to prosecute his right, confines himself to shewing sufficiently by any sign whatsoever that he would not abandon it. This answers the purpose of protestations. Among sovereigns they preserve the title and arms of a sovereignty, or of a province, to shew that they do not abandon their rights.

§ 146. Every proprietor who does, or who expressly omits things which he cannot do; or omit, without renouncing his right, sufficiently indicates, by that means, that he would not preserve it, at least, if he does not make an express reservation. People have doubtless a right to consider as true, what he sufficiently evinces on occasions where he ought to declare the truth; consequently, they lawfully presume, that he has abandoned his right; and if he would afterwards resume it, they may oppose to him prescription.

§ 147. After having shewn that *usucaption* and *prescription* are founded in the law of nature, it is easy to prove that they are equally a part of the law of nations, and ought to take place between different states. For the law of nations is nothing but the application of the law of nature to nations, rendered, in a manner, suitable to the subject (Prelim. § 6.) And so far is the nature of the subject from forming here any exception, that usucaption and prescription are much more necessarily used between sovereign states, than between individuals. Their quarrels are attended with very different consequences, their disputes are usually terminated

minated only by bloody wars; and consequently the peace and happiness of mankind much more powerfully require that the possessions of sovereigns should not be easily disturbed, and that if they have not been disputed for a great number of years, they be reputed just, and not to be disputed. Where it permitted to have constantly recourse to ancient times, there are few sovereigns who would enjoy their rights in security, and there would be no peace to be hoped for on earth.

It must however be confessed, that usucaption and prescription are often more difficult in their application to nations, as these rights are founded on a presumption drawn from a long silence. Nobody is ignorant how dangerous it commonly is for a weak state to discover only the shadow of any pretension to the possessions of a powerful monarch. It is therefore difficult to found a lawful presumption of its having abandoned a right from a long silence. Add to this, that the conductor of the society having commonly no power to alienate what belongs to the state, his silence can be of no prejudice to the nation or to his successors, though it should even be presumed that it was abandoned by him. The question then would be, whether the nation has neglected to supply the silence of its conductor, or whether it had shared in it by a tacit approbation.

But there are other principles that establish the use and force of prescription between nations. The tranquillity of the people, the safety of states, the happiness of the human race, do not allow that the possessions, empire, and other rights of nations, should remain uncertain, subject to dispute, and always ready to occasion bloody wars. It is necessary then to admit between nations a prescription founded on a long space of time, as a solid and incontestible method. If any one has kept silence through fear, by a kind of necessity, the loss of his right is a misfortune which he ought to suffer patiently, since he cannot avoid it; and why should he not support it as well as having his towns and provinces taken from him by an unjust conqueror, and being afterwards forced to cede them to him by treaty? These reasons establish the use of prescription, only in the case of a very long possession undisputed and uninterrupted; because, it is necessary that affairs should be at length terminated and established on a firm and solid foundation. All this can be of no weight, when the possession has lasted only a few years, during which prudence may require a person to keep silence, without there being any room to accuse him of suffering things to become uncertain, and of renewing quarrels without end.

As to immemorial prescription, what we have said (§ 143.) is sufficient to convince every one, that it ought necessarily to take place between nations.

Usucaption and prescription being so necessary to the tranquillity and happiness of human society, it is justly presumed that all nations have consented to admit the use of them as lawful and reasonable,

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§ 148.
It is more difficult to found them among nations on a presumptive desertion.

§ 149.
Other principles that enforce prescription.

§ 150.
Of the voluntary law of nations on this subject.

reasonable, with a view to the common advantage, and even to the particular benefit of each nation.

Prescription of many years standing, as well as usucaption, is then established by the voluntary law of nations (Prelim. § 21).

As in virtue of the same right, nations in all doubtful cases, are supposed to act with respect to each other, with an equal right (ibid); so the prescription ought much more to have its effect between nations, as soon as it is founded on a long undisputed possession, without it being allowable, at least if no clear evidence be brought to prove that the possession is unjust. For without such evidence, every nation is considered as being possessed of good faith. Such is the right that a sovereign state ought to grant to others; but it ought only to allow itself the use of the internal and necessary right (Prelim. § 28). Prescription is only lawful at the bar of conscience, with respect to an honest possessor.

§ 151.
Of the right
of treaties
or of custom
in this mat-
ter.

Since prescription is subject to so many difficulties, it would be of great advantage for neighbouring nations to submit to a rule in this respect by treaties, principally with regard to the number of years required to found a lawful prescription, since this last cannot be in general determined by the law of nature alone. If in default of treaties, custom has determined any thing in this matter, the nations between whom this custom is in force, ought to conform to it (Prelim. § 26).

CHAP. XII.

Of Treaties of Alliance, and other public Treaties.

§ 152.
The nature
of treaties.

THE subject of treaties is, doubtless, one of the most important that the mutual relation and affairs of nations can present us with. Too much convinced of the little foundation that can be placed on the natural obligations of bodies politic, and on the reciprocal duties imposed upon them by humanity; the most prudent endeavour to procure by treaties the succours and advantages which the law of nature would secure to them, if the pernicious counsels of a false policy did not render it ineffectual.

A treaty, in Latin *fœdus*, is a pact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time.

§ 153.
Of pactions,
agreements,
or conventions.

The pacts, with a view to transitory affairs, are called agreements, conventions, and pactions. They are accomplished by one single act, and not by irritated oaths. These pacts are perfected in their execution once for all: treaties receive a successive execution, the duration of which equals that of the treaty.

§ 154.
By whom
treaties are
made.

Public treaties can only be executed by superior powers, by sovereigns who contract in the name of the state. Thus the conventions made by sovereigns between each other for their

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own private affairs, and those between a sovereign and a private person, are not public treaties.

The sovereign who possesses the full and absolute authority, has, doubtless, a right to treat in the name of the state he represents; his engagements are binding with respect to the whole nation. But all the conductors of states have not the power of making of themselves public treaties: some are obliged to take the advice of a senate, or of the representatives of the nation. In the fundamental laws of each state, we must see what is the power capable of contract with validity in the name of the state.

What we say here of public treaties, being only to be made by the superior power, does not hinder that treaties of this nature may not be made by princes or communities who have a right to do it, either by the concession of the sovereign, or by the fundamental laws of the state, by reservation or by custom. Thus the princes and free cities of Germany have the right of forming alliances with foreign powers, though they hold of the emperor and the empire. The constitution of the empire give them, in this respect, as in many others, the rights of sovereignty. Some cities of Switzerland, though subject to a prince, have made alliances with the cantons: the permission or toleration of the sovereign has given birth to these treaties, and a long use has established a right.

A state that has put itself under the protection of another, not losing on that account its quality of sovereignty (Book I. § 192), makes treaties and contracts alliances, at least, if it has not expressly renounced that right, in the treaty of protection. But this treaty of protection is binding ever after, so that the state can enter into no engagements contrary to it, that violate the express conditions of the protection, or that are repugnant in their own nature to every treaty of protection. Thus the protected cannot promise assistance to the enemies of the protector, nor grant them a passage.

§ 155.
If a state
underpro-
tection may
conclude
treaties.

Sovereigns treat with each other by their proxies, who are invested with sufficient power, and who are commonly called plenipotentiaries. We here apply all the rules of the law of nature to things that are done by commission. The rights of the proxy are expressed in the instructions that are given him: he ought not to deviate from them; but every thing he promises within the terms of his commission, and the extent of his powers, bind his constituent.

§ 156.
Treaties
concluded
by proxies
or plenipo-
tentiaries.

At present, in order to avoid all danger and difficulty, princes reserve to themselves the ratification of what has been concluded upon, in their name, by their ministers. The full power is nothing but a *procuratio cum libera*. If this procuratio was to have its full effect, they could not be too circumspect in giving it. But as princes cannot be constrained to fulfil their engagements, any otherwise than by force of arms, they are accustomed not to lay any stress on their treaties, till they have agreed upon, and ratified them. Every thing that their ministers have concluded remaining,

without force, till the princes ratification, there is less danger in giving him a full power. But to refuse with honour to ratify what has been concluded on, by virtue of a full power, it is necessary that the sovereign should have strong and solid reasons, and that he should shew in particular that his minister has deviated from his instructions.

§ 157.
Of the validity of treaties.

A treaty is valid, if there be no fault in the manner in which it was concluded: and for this purpose nothing more can be required, than a sufficient power in the contracting parties, and their mutual consent, sufficiently declared.

§ 158.
Injury does not render them void.

An injury cannot then render a treaty invalid. He who enters into engagements ought carefully to weigh every thing before he concludes: he may do what he pleases with his own property, relax his rights, and renounce his advantages, as he thinks proper; the acceptor is not obliged to inform himself of his motives, and to weigh their just value. If we might break a treaty, because we found ourselves injured by it, there would be no stability in the contracts of nations. Civil laws may set bounds to injury, and determine the point capable of producing the utility of a contract. But sovereigns acknowledge no judge. How shall they obtain a certainty of the injury? Who shall determine the degree sufficient to invalidate a treaty? The peace and happiness of nations manifestly require that their treaties do not depend on a nullity so vague and dangerous.

§ 159.
The duty of nations in this respect.

But a sovereign is not less obliged in point of conscience to pay a regard to equity, and to observe it as much as possible, in all his treaties. And if it happens that a treaty he has honestly concluded, without his perceiving any iniquity in it, turns at length to the detriment of an ally, nothing can be more amiable, more laudable, more conformable to the reciprocal duties of nations, than to yield as much as possible, without being wanting to himself, without putting himself in danger, or without suffering a considerable loss.

§ 160.
The nullity of treaties pernicious to the state.

Though the simple injury, or some disadvantage in a treaty, is not sufficient to render it invalid, the case is not the same with those inconveniences that lead to the ruin of the state. Since every treaty ought to be made with a sufficient power, a treaty pernicious to the state is null, and not at all obligatory; no conductor of the nation having the power to enter into engagements to do such things as are capable of destroying the state, for the safety of which the empire is intrusted to him. The nation itself being necessarily obliged to perform every thing required for its preservation and safety (Book I. §. 16. and following), it cannot enter into engagements contrary to its indispensable obligations. In the year 1566, the states-general of the kingdom of France assembled at Tours, engaged Louis XII. to break the treaty he had concluded with the emperor Maximilian, and the archduke Philip, his son; because that treaty was pernicious to the kingdom. They also found, that neither the treaty, nor the oath that had accompanied it, could oblige the king to alienate the

domi-

dominions of the crown *. We have treated of this last means of nullity (Book I. Chap. XXI.)

From the same reason, a want of power, a treaty made from an unjust and dishonest intention is absolutely null, nobody having a right to engage to do things contrary to the law of nature. Thus an offensive alliance made to ravage a nation, from whom there has been no injury received, may, or rather ought to be, broken.

It is asked, if it be allowable to make an alliance with a nation that does not profess the true religion, and whether treaties made with the enemies of the faith are valid? Grotius † has treated this subject at large, and this discussion might be necessary at a time when the madness of party still darkened those principles which it had long caused to be forgotten: but we may venture to believe, that it would be superfluous in our age. The law of nature alone regulates the treaties of nations: the difference of religion is a thing absolutely foreign to them. Different people treat with each other in quality of men, and not under the character of Christians, or of Musulmans. Their common safety requires that they should treat with each other, and treat with security. Every religion that should in this case clash with the law of nature, would bear upon it the marks of reprobation; and it could not come from the author of nature, who is always constant, always faithful. But if the maxims of a religion tend to establish it by violence, and to oppress all those who will not receive it, the law of nature forbids the favouring of that religion, or our uniting ourselves, without necessity, to its inhuman followers; and the common safety of mankind invites them rather to enter into an alliance against madmen, and to repress the bigoted fanatics who disturb the public repose, and threaten all nations.

It is shewn by the law of nature, that he who has made a promise to any one, has conferred upon him a true right to require the thing promised; and that, consequently, not to keep a perfect promise, is to violate the right of another; and is as manifest an injustice, as that of depriving a person of his property. All the tranquillity, the happiness, and security of the human race, rests on justice; on the obligation of paying a regard to the rights of others. The respect of others for our rights of domain and property constitutes the security of our actual possessions; the faith of promises is our security for the things that cannot be delivered or executed upon the spot. There would be no more security, no longer any commerce between mankind, did they not believe themselves obliged to preserve their faith, and to keep their word. This obligation is then as necessary, as it is natural and indubitable between the nations that live together in a state of nature, and acknowledge no superior upon earth, to maintain order and peace in their society. Nations, and their conductors,

§ 161.
The nullity of treaties made for an unjust or dishonest purpose.

§ 162.
If it be permitted to enter into an alliance with those who do not profess the true religion.

§ 163.
The obligation of observing treaties.

* See the French historians.

† *De Jure Belli & Pacis*, Lib. II. Cap. XV. § 8. & seq.

ought then, to keep their promises and their treaties inviolable. This great truth, though too often neglected in practice, is generally acknowledged by all nations *: the reproach of perfidy is esteemed by sovereigns a most atrocious injury; now he who does not observe a treaty, is certainly perfidious, since he violates his faith. On the contrary, nothing adds so great a glory to a prince, and the nation he governs, as the reputation of an inviolable fidelity to his promises. By this, and by their bravery, the Swifs have rendered themselves respectable throughout Europe, and have merited the honour of being fought for by the greatest monarchs, who trust to them the security of their persons. The parliament of England has more than once thanked the king for his fidelity and zeal in succouring the allies of his crown. This national greatness of soul is the source of an immortal glory; upon it is founded the confidence of nations, and it thus becomes a certain instrument of power and splendor.

§ 164.
The violation of a treaty is an injury.

§ 165.
Treaties cannot be made contrary to those that subsist.

As the engagements of a treaty impose on the one hand a perfect obligation, they produce on the other a perfect right: To violate a treaty, is then to violate the perfect right of him with whom we have contracted, and this is to do him an injury.

A sovereign already bound by a treaty cannot make others contrary to the first. The things about which he has entered into engagements are no longer at his disposal. If it happens that a posterior treaty is found, in some point, to contradict one that is more ancient, the new treaty is null, with respect to that point, as disposing of a thing that is no longer in the power of him who appears to dispose of it: (this relates to treaties made with different powers). If the ancient treaty is secret, it will have the appearance of bad faith to conclude a contrary one, that may be rendered void whenever occasion serves; and it is not even allowed to enter into engagements, which from the occurrences that may happen, may be found opposite to the secret treaty, and by that means void; at least, if we are unable fully to recompense the new ally otherwise, it would be to abuse him to promise him any thing without informing him that such cases might arise, in which we shall not have the liberty of discharging that promise. The ally thus abused may, doubtless, renounce the treaty; but if he chooses rather to adhere to it, the treaty will hold good with respect to all the articles that are not opposite to the more ancient treaty.

§ 166.
How treaties may be concluded with several nations with the same view.

Nothing hinders a sovereign from entering into engagements of the same nature with two or more nations, if he is at the same time able to fulfil them with respect to all his allies. For example, a treaty of commerce with one nation does not prevent others being afterwards made with different states, unless a pro-

* Mahomet warmly recommended to his disciples the observation of treaties. Ockley's History of the Saracens, Vol. I.

mise is made in the first treaty, not to grant the same advantages to any other. We may in the same manner promise to assist two different allies with troops, if we are able to furnish them both, or if there is no appearance that both will have occasion for them at the same time.

If, nevertheless, the contrary happens, the most ancient ally ought to be preferred; for the engagement was pure and absolute with respect to him, while we were unable to contract a second, but by reserving the right of the first. The reservation is a right, preferred, and it is a tacit reservation, if it is not expressly made.

The justice of the cause is another reason of preference, between two allies; and even we ought not to assist him whose course is unjust, whether he be at war with one of our allies, or with another state. For this would be the same, as if we contracted an alliance for an unjust purpose; which is not permitted (§ 161.) No one can be validly engaged to support injustice.

Grotius divides treaties into two general classes: *the first, those which turn merely on things to which we were already bound by the law of nature; and the second of those, by which we engage something more* *. The first serves to secure a perfect right to things to which we had only an imperfect right, so that from thence forward we might require what before we had only a foundation to desire, as an office of humanity. Such treaties became very necessary among the ancient nations, who, as we have already observed, did not think themselves bound to perform any thing for the nations that were not in the number of their allies. They are even of use among the most polite people, in order the better to secure the succours that may be expected, to determine the measure and degree of these succours, and to know on what we have to depend, to regulate what cannot in general be determined by the law of nature, and to prevent the difficulties and various interpretations of that law. In short, as the power of assistance in any nation is not inexhaustible, it is prudent to secure ourselves a proper right to succour, that cannot be granted to all the world.

Of this first class are all the simple treaties of peace and friendship, when the engagements contracted in them add nothing to what men owe each other as brethren, and as members of the human society; as those that permit commerce, passage, &c.

If the assistance and offices that are due in virtue of such a treaty, are found, upon some occasions, incompatible with the duties a nation owes to itself, or with what the sovereign owes to his own nation, the case is tacitly and necessarily excepted in the treaty. For neither the nation nor the sovereign can enter into an engagement to abandon their own safety, or the safety of the state, to contribute to that of their ally. If the sovereign has occasion, in order to preserve his own nation, for the things he has promised in the treaty; if, for example, he has engaged to furnish corn, and in a time of dearth he has scarcely sufficient for

§ 167.
The most
ancient ally
should be
preferred.

§ 168.
We owe no
assistance in
an unjust
war.

§ 169.
General di-
vision of
treaties.
1. Of those
that relate
to things
already due
by the law
of nature.

§ 170.
Of the col-
lision of
these trea-
ties, with
the duties
we owe to
ourselves.

* *De Jure Belli & Pacis, Lib. II. Cap. XV. § 5.*

the nourishment of his subjects, he ought without difficulty to prefer his own nation. For he naturally owed assistance to a foreign state, only so far as that assistance was in his power, and he can only promise it by a treaty upon the same footing. Now it is not in his power to take away the subsistence of a nation, in order to give it to another. Necessity here forms an exception, and he does not violate the treaty, because he cannot fulfil it.

§ 171.
Of treaties
that pro-
mise merely
the doing
no injury.

The treaties by which we simply engage not to do any evil to an ally, to abstain, with respect to him, from all damage, offence, and injury, are not necessary, and produce no new right; each having already from nature, a perfect right not to suffer either damage, injury, or any true offence. However, these treaties become very useful, and accidentally necessary, among those barbarous nations who think they have a right to make any attempts against foreigners. They are not useless with respect to nations less savage, who, without so far divesting themselves of humanity, are, however, much less affected by a natural obligation, than by one they themselves have contracted by solemn engagements: and would to God that this manner of thinking was entirely confined to barbarians! We see too frequent effects of it among those who boast of a perfection much superior to the law of nature. But the name of perfidious is prejudicial to the conductors of nations; and it becomes, by this means, formidable to those themselves who are but little curious about meriting that of virtuous men, and who know how to get rid of the reproaches of conscience.

Treaties in which sovereigns engage to do what they are not obliged to perform by the law of nature, are either *equal* or *unequal*.

§ 172
Treaties
concerning
things that
are not nat-
urally due.
Of treaties
equal.

Treaties equal are those in which the contracting parties promise the same things, or things that are equivalent, or, in short, that are equitably proportioned, so that their condition is equal. Such is, for example, a defensive alliance, in which they reciprocally stipulate for the same succours. Such is an offensive alliance, in which it is agreed, that each of the allies shall furnish the same number of vessels, the same number of troops, of cavalry and infantry, or an equivalent in vessels, in troops, in artillery, or in money. Such is also a league in which the contingent of each of the allies is regulated in proportion to the interest he takes or may have in the design of the league. Thus the emperor and the king of England, in order to engage the states-general of the United Provinces to accede to the treaty of Vienna, of the 16th of March, 1751, consented that the republic should only promise her allies succour of four thousand foot and a thousand horse, though they engaged to furnish the republic, in case it was attacked, each with eight thousand foot and four thousand horse. We ought also to place in the rank of equal treaties, those that declare that the allies shall make a common cause, and act with all their forces. Though, in fact, their forces are not equal, they may well be considered as equal.

Equal

Equal treaties may be subdivided into as many kinds as the sovereigns have different transactions between them. Thus they treat of the conditions of commerce, of their mutual defence, of associations in war, of the passage they shall reciprocally grant to each other, or refuse to the enemies of their ally; they engage not to build fortresses in certain places, &c. But it would be useless to enter into these particulars: generals are sufficient, and are easily applied to particular cases.

Nations not being less obliged than individuals to have a regard to equity, they ought, as much as possible, to preserve equality in their treaties. When therefore the parties are in such a state as to obtain the same reciprocal advantages, the law of nature requires that their treaties should be equal, at least, if there is not some particular reason to deviate from that equality; such would be, for instance, gratitude for a former benefit, the hope of becoming inviolably attached to a nation, from some motive which influences one of the contracting parties to conclude the treaty, &c. And even, if we judge rightly, the consideration of this particular reason restores to the treaty that equality which seems to be taken from it by the difference of the things promised.

§ 173.
The obligation of preserving equality in treaties.

I see those pretended great politicians smile, who place all their subtilty in circumventing those with whom they treat, and regulating the conditions of the treaty in such a manner, that all the advantage shall accrue to their masters. Far from blushing at a conduct so contrary to equity, to rectitude, and natural honesty, they make it their glory, and pretend to merit the name of great negociators. How much do men in a public character glory in what would dishonour an individual! The private man, if he is without conscience, also laughs at the rules of morality and justice; but he laughs in secret; it would be dangerous and prejudicial to him, publicly to make a mock of them; the powerful abandon more openly the honest for the useful. But it frequently happens, for the happiness of the human race, that this pretended utility becomes fatal to them; and even among sovereigns, candour and rectitude are found to be their safest politics. All the subtilties, all the shufflings of a famous minister, on occasion of a very interesting treaty with respect to Spain, turned at length to his confusion, and the damage of his master; while the good faith, the generosity of England towards her allies, procured her an immense credit, and raised her to the highest point of influence and respect.

When people speak of equal treaties, they have commonly in their minds a double idea of the equality of the engagement and the equality of the dignity of the contracting parties. It is necessary to take away every thing that may appear equivocal, and for this purpose to distinguish between *equal treaties* and *equal alliances*. *Equal treaties* are those where equality is kept in promises, as we have just explained them (§ 172.); and *equal alliances*, those where equal treats with equal, forming no difference in the contracting parties, or, at least, admitting no superiority too plainly

§ 174.
The difference between equal treaties and equal alliances.

ly pointed out ; but only some pre-eminence of honours and rank. Thus kings treat with the emperor as equal with equal, though they without difficulty allow him the first place. Thus great republics treat with kings as equal with equal, in spite of the pre-eminence they at present allow them. Thus every true sovereign ought to treat with the most powerful monarch, since they are as really sovereigns, and as independent as himself, (see above § 37. of this Book).

§ 175.
Of unequal
treaties,
and un-
equal alli-
ances.

Unequal treaties are those in which the allies do not promise the same things ; and the *alliance* is *unequal* when it makes a difference in the dignity of the contracting parties. 'Tis true, that, most commonly an unequal treaty will be at the same time an unequal alliance ; great potentates being seldom accustomed to give more than is given to them, to promise more than is promised to them, if they are not rewarded for it on the side of glory and honour ; on the contrary, a weak state does not submit to burthenfome conditions, without being obliged also to acknowledge the superiority of its ally.

Those unequal treaties, that are at the same time unequal alliances, are divided into two kinds : the first, those where *the inequality is found on the side of the most considerable power* ; and the second comprehends treaties where *the inequality is on the side of the inferior power*.

In the first kind, without attributing to the more powerful any right over the more weak, there is given him only a superiority of honours and respect. We have treated of this in Book I. § 5. Frequently a great monarch, resolving to engage a weak state in his interest, makes it advantageous conditions, or greater than those it would stipulate for itself ; but he claims at the same time a superiority of dignity, and requires respect from his ally. This last particular renders *the alliance unequal*. To this we ought to pay attention ; for we ought not to confound with these alliances, those in which equal treats with equal, though the most powerful of the allies, for particular reasons, gives more than he receives, promises his assistance gratis, without requiring a return, more considerable succours, or even the assistance of all his forces : here the alliance is equal ; but the treaty is unequal ; if it is not always true to say, that he who gives most, having a greater interest in concluding the treaty, his consideration restores the equality. Thus the French finding themselves embarrassed in a war with the house of Austria, Cardinal de Richelieu, resolving to humble that formidable power, he, like an able minister, concluded a treaty with Gustavus Adolphus, in which all the advantage appeared to be on the side of the Swede. On considering only the stipulation, we should have said, that the treaty was unequal ; but the advantages France derived from it, largely compensated for that inequality. The alliance of France with the Swiss, if we stop at the stipulation, is an *unequal* treaty ; but the valour of the Swiss troops has for a long time restored the equality ; the difference of their interests and wants unites these

these together. France, often involved in bloody wars, has received essential services from the Swiss: the Helvetic body, without ambition, without a spirit of conquest, may live in peace with the whole world; they have nothing to fear, since they have made the ambitious feel that the love of liberty gives the nation sufficient strength to defend its frontiers. This alliance may at certain times appear unequal. Our forefathers studied ceremonies but little. Though, in reality, and especially since the absolute independence of the Swiss is acknowledged by the empire itself, the alliance is certainly equal; notwithstanding the Helvetic body, without difficulty, pays to the king of France all the pre-eminence which the modern customs of Europe attribute to crowned heads, and especially to great monarchs.

Treaties in which the inequality is found on the side of the inferior powers, that is, those which impose on the more weak, more extensive obligations, or greater burthens; or oblige them to perform things disagreeable and painful: these unequal treaties, I say, are always at the same time unequal alliances; for the more weak never submit to burthensome conditions, without being obliged also to acknowledge the superiority of the ally. These conditions are commonly imposed by the conqueror, or dictated by necessity, which obliges a weak state to seek the protection or assistance of another more powerful, and by this means it acknowledges its superiority. Besides, this forced inequality, in a treaty of alliance, swallows up and depresses its dignity, at the same time that it exalts that of the more powerful ally. It also happens that the more weak, not being able to promise the same succours as the more powerful, it becomes necessary that it should make a compensation for it by engagements that degrade it below its ally, and often must even submit, in certain respects, to his will. Of this kind are all the treaties where the more weak engages not to make war without the consent of the more strong, and to have the same friends, and the same enemies, to maintain, and pay a respect to its majesty, to have no fortresses in certain places, not to trade, nor raise soldiers in certain free countries, to deliver up its vessels of war, and not to build others, as the Carthaginians did to the Romans; to keep up only a certain number of troops, &c.

These unequal alliances are subdivided into two kinds; they either degrade the sovereignty, or they do not. We have touched slightly on this in Book I. Chap. I. and XVI.

The sovereignty subsists intire, when none of the rights, of which it is constituted, is conveyed to the superior ally, or rendered dependant on his will in the exercise that may be made of them. But the sovereignty is degraded when any of its rights are ceded to an ally, or even if the use of them is merely rendered dependent on the will of that ally. For example, the treaty does no injury to the sovereignty, if the weaker state only promises not to attack a certain nation without the consent of its ally. By this means it does not strip itself of its right, nor does it submit to him the exercise of it; it only consents to a restriction in fa-

vour of its ally ; and in this manner it no more diminishes its liberty, than is necessarily done in all promises. People every day lay themselves under such restraints in alliances that are perfectly equal. But to engage not to make war against any one whatsoever, without the consent or permission of an ally, who on his side does not make the same promise, is to contract an unequal alliance with diminution of sovereignty ; for it is to deprive him of one of the most important parts of the sovereign power, by committing the exercise of it to another's will. The Carthagenians having, in the treaty that terminated the second Punic war, promised not to make war on any state without the consent of the Romans, were then, for that reason, considered as dependent on the Romans.

§ 176.
How an alliance with diminution of sovereignty may annul preceding treaties.

When a people are forced to receive laws, they may legally renounce their preceding treaties, if he with whom they are constrained to enter into an alliance requires it from them. As they then lose a part of their sovereignty, their ancient treaties fall with the powers that had concluded them. This is a necessity that cannot be imputed to them ; and since they had a right to submit themselves absolutely, and to renounce all sovereignty, if it became necessary for their preservation ; by a much stronger reason, they have a right, under the same necessity, to abandon their allies. But a generous people will try every resource before they will submit to so severe and humbling a law.

§ 177.
We ought to avoid as much as possible inking unequal alliances.

In general, every nation ought to be jealous of its glory, careful of maintaining its dignity, and preserving its independence ; it should therefore be induced by nothing but extremity, or the most important reasons, to contract an unequal alliance. This particularly relates to treaties where the inequality is found on the side of the weaker ally, and still more to those unequal alliances that degrade the sovereignty : men of courage will receive them only from the hand of necessity.

§ 178.
The mutual duties of nations with respect to unequal alliances.

Whatever a self-interested politician may say, we should either absolutely deliver sovereigns from the authority of the law of nature, or agree that they are not allowed to oblige, without just reason, the weaker states to submit to them their dignity, much less their liberty, by an unequal alliance. Nations owe to each other the same assistance, the same respect, the same friendship, as individuals living in a state of nature. Far from seeking to humble the weak, and to despoil them of their most precious advantages, they will respect, they will maintain their dignity and their liberty, if they are inspired by virtue more than by pride ; if they are more moved by principles of integrity than by a mean self-interest ; what I do say ? If they have such a degree of understanding as to know their true and real interest. Nothing more firmly secures their power of a great monarch than his regard to all sovereigns. The more careful he is of offending the weak, the greater esteem they will have for him, and the more they will revere him ; they love a power who makes them feel his superiority only by his benefits ; they fix themselves to him as to their support,

port, and he becomes the arbiter of nations. Had he behaved with pride, he would have been the object of their jealousy and fear, and perhaps have one day sunk under their united efforts.

But as the weak ought, in their necessity, to accept with gratitude, the assistance of the more powerful, and not to refuse him the honours, the respect, that flatters him who receives them, without degrading him by whom they are rendered; so nothing is more conformable to the law of nature, than assistance generously given by the more powerful state without requiring a return; or, at least, an equivalent. And it is found here, that advantage is obtained by the practice of duty. Good policy will not permit a great power to suffer the oppression of the small states in his neighbourhood. If he abandons them to the ambition of a conqueror, this last will soon become formidable to himself. Thus sovereigns, who are commonly faithful enough with respect to their own interest, seldom fail to attend to this maxim. Hence those alliances sometimes against the house of Austria, sometimes against its rival, according as the power of the one or the other preponderates. Hence that balance of power, the object of perpetual negotiations and wars.

§ 179.
In those that are unequal on the most powerful side.

When a weak and poor nation has occasion for another kind of assistance, when it is afflicted by a famine, we have seen (§ 5.) that those who have provisions ought to furnish them at a just price; it would be noble to afford them at a low rate, or to make a present of them, if a nation is incapable of paying for them. To make it buy them by an unequal alliance, and especially at the expence of its liberty, to treat them as Joseph formerly treated the Egyptians, would be a severity almost as dreadful, as suffering them to perish with hunger.

But there are cases where the inequality of treaties and alliances, dictated by some particular reasons, is not contrary to equity, nor consequently to the law of nature. These cases are in general all those in which the duties of one nation towards itself, or its duty to others, invite it to deviate from equality. For instance, if the sovereign of a weak state should without necessity build a fortress, which he would be incapable of defending, in a place where it might become very dangerous to his neighbour, if ever it fell into the hands of a powerful enemy; this neighbour may oppose the construction of the fortress; and if it is not convenient to pay for the compliance he demands, he may obtain it by threatening to break up the roads of communication, to forbid all commerce, to build fortresses, or to keep an army on the frontier, to consider that little state as suspicious, &c. He imposes indeed an unequal condition; but this is authorised by the care of his own safety. In the same manner he may oppose the forming of a highway, that would open to an enemy an entrance into his state. War might furnish us with a multitude of other examples. But people frequently abuse rights of this nature: it requires as much moderation as prudence to avoid turning them into oppression.

§ 180.
How inequality of treaties and alliances may be conformable to the law of nature.

The

The duties towards others sometimes also counsel and authorise this inequality in a contrary sense, since without this a sovereign may be accused of being wanting to himself or to his people. Thus gratitude, the desire of shewing his sensibility for a benefit, may induce a generous sovereign to enter into an alliance with joy, and to give in the treaty more than he receives.

§ 181.
Of inequality imposed by way of punishment.

Or he may with justice impose the conditions of an unequal treaty, or even an unequal alliance, by way of punishment, in order to punish an unjust aggressor, and to put him out of a condition of easily hurting him afterwards. Such was the treaty to which Scipio Africanus forced the Carthaginians to submit, after he had conquered Hannibal. The conqueror often gives such laws; and by this means he neither offends justice nor equity, if he remains within the bounds of moderation, after he has triumphed in a just and necessary war.

§ 182.
Other kinds of which we have spoken elsewhere.

The different treaties of protection, those by which a state renders itself tributary or feudatory to another, form so many kinds of unequal alliances. But we shall not repeat here, what we have said in Book I. Chap. I. and XVI.

§ 183.
Of personal and real treaties.

By another general division of treaties or alliances, they are distinguished into *personal* and *real*: the first are those that relate to the person of the contracting parties, and are restrained, and in a manner attached to them. *Real alliances* relate only to the things of which they treat, without any dependence on the person of the contracting parties.

The *personal alliance* expires with him who contracted it.

The *real alliance* is affixed to the body of the state, and subsists as long as the state, if the time of its duration is not limited.

It is of great use not to confound these two sorts of alliances. Therefore sovereigns are at present accustomed to explain themselves in such a manner as to leave no uncertainty in this respect, and this is doubtless the best and safest method. In want of this precaution, the matter of the treaty, or the expressions in which it is conceived, may furnish the means of discovering, whether it be real or personal. Let us give some general rules on this subject.

§ 184.
The names of contracting parties in the treaty do not render it personal.

In the first place, from naming in the treaty the sovereigns who contract, we ought not to conclude that the treaty was personal; for the name of the sovereign who actually governs is often inserted with the sole view of shewing with whom it is concluded, and not to make known that they have treated with him personally. This is an observation of the civilians Pedius and Ulpian *, repeated by all authors.

§ 185.
An alliance made by a republic is real.

Every alliance made by a republic is in its own nature real, for it relates only to the body of the state. When a free people, a popular state, or an aristocratical republic concludes a treaty, it is the state itself that contracts: and its engagements do not depend on the lives of those who were only the instruments: the mem-

* *Digest. Lib. II. Tit. XIV. De Pactis, Leg. VII. § 8.*

bers of the people or of the regency change and succeed each other ; but the state is always the same.

Since then such a treaty directly relates to the body of the state, it subsists, though the form of the republic happens to be changed, and though it should be even transformed into a monarchy. For the state and the nation are always the same, whatever changes are made in the form of the government, and the treaty concluded with the nation remains in force as long as the nation exists. But it is manifest that we ought to except from this rule all the treaties that relate to the form of the government. Thus two popular states that have treated expressly, or that appear evidently to have treated with the view of maintaining themselves in concert in their state of liberty and popular government, cease to be allies at the very moment when one of them has submitted to be governed by a single person.

Every public treaty concluded by a king, or by any other monarch, is a treaty of the state ; it lays under an obligation the entire state, the nation which the king represents, and whose power and right he exercises. It seems then, at first, that every public treaty ought to be presumed real, as concerning the state itself. There is no doubt with respect to the obligation to observe the treaty ; this relates only to its duration. Now there is often room to doubt whether the contracting parties have intended to extend the reciprocal engagements beyond the term of their own lives, and to bind their successors. Conjunctures change ; a burthen that is to day light, may in other circumstances become insupportable, or too heavy : the manner of thinking among sovereigns is no less variable ; and there are things which it is convenient that each prince should dispose of freely according to his own plan. There are others that are freely granted to a king, and would not be permitted to his successor. It is necessary then to consider the terms of the treaty, or the design of it, in order to discover the intentions of the contracting powers.

Treaties that are perpetual, and those made for a determinate time, are real ; since their duration does not depend on the lives of the contracting parties.

In the same manner, when a king declares in the treaty that it is made for himself and his successors, it is manifest that the treaty is real. It is affixed to the state, and made in order to last as long as the kingdom itself.

When a treaty expressly declares, that it is made for the good of the kingdom, is a manifest indication that the contracting powers have not intended to make it depend on the duration of their lives ; but rather to affix it to the duration of the kingdom itself : the treaty is then real.

Independently even of this express declaration, when a treaty is concluded to procure an advantage to the state that will always subsist, there is no reason to believe that the prince who has concluded it, was willing to limit it only to the duration of his life. Such a treaty ought then to be considered as real, unless very

§ 186.
Of treaties
concluded
by kings or
other mo-
narchs.

§ 187.
Treaties
perpetual
and for a
certain
time.

§ 188.
Treaties
made for
the king
and his suc-
cessors.

§ 189.
Treaties
made for
the good of
the king-
dom.

strong reasons shew, that he with whom it was concluded, granted the advantage to which it relates, only out of regard to the prince then reigning, and as a personal favour; in this case the treaty terminates with the life of the prince, the reason of the concession expiring with him. But this reserve is not easily presumed; for it would seem, that if contracting parties had this in their view, they would have expressed it in the treaty.

§ 190.
How pre-
sumption
ought to be
founded in
doubtful
cases.

In case of doubt, when nothing clearly establishes either the personality or the reality of a treaty, it ought to be presumed real, if it turns on things that are favourable, and personal in matters that are odious. The things favourable are here those that tend to the common advantage of the contracting powers, and that equally favour the two parties; things odious are those that burthen one party alone, or that are a greater grievance to one than the other. We shall speak of them more at large in the chapter on the interpretation of treaties. Nothing is more conformable to reason and equity than this rule: whenever certainty is wanting in the affairs of men, we must have recourse to presumption. Now if the contracting powers have not explained themselves, it is natural, when it relates to things favourable, and equally advantageous to the two allies, to think that they intended to make a real treaty, as one most useful to their respective kingdoms; and if we deceive ourselves in this presumption, we do no injury either to the one or the other. But if the engagement has something odious, if one of the contracting states finds itself overburthened, how can it be presumed that a prince who entered into such engagements, was willing to lay that burthen for ever upon his kingdom? Every sovereign is presumed to desire the safety and advantage of the state with which he is entrusted; it cannot then be supposed, that he has consented to load it for ever with a burthen some obligation. If necessity has made it a law to him, it was the business of his ally to make him explain himself clearly, and it is probable he would not have failed to do it, knowing that men, and particularly sovereigns, seldom submit to heavy and disagreeable burthens, if they are not in due form obliged to it. If it happens then that the presumption is a mistake, and makes him lose something of his right, it is a consequence of his own negligence. Let us add, that if neither the one nor the other ought to lose his right, equity will be less wounded by the loss which this will suffer from a gain which he could only obtain by the damage he intended the other: this is the famous distinction *de lucro captando*, and *de damno vitando*.

We, without difficulty, place equal treaties of commerce in the number of those that are favourable, since they are in general advantageous, and very conformable to the law of nature. As to alliances made on account of war, Grotius says, with reason, that "defensive alliances have a more favourable aspect, and those that are offensive have something in them that approaches nearer to what is burthen some or odious *."

* *De Jure Belli & Pacis, Lib. II. Cap. XVI. § 16.*

We could not dispense with slightly mentioning in a few words these discussions, in order that we might not leave here a disagreeable void. However, they are but of little use in practice; sovereigns at present generally using the wise precaution of clearly determining the duration of their treaties. They treat for themselves and their successors, for themselves and their kingdoms for perpetuity, for a certain number of years, &c. Or they treat only for the time of their reign, for an affair peculiar to themselves, or their families, &c.

Since public treaties, and even those that are personal, concluded by a king or by any other sovereign who is invested with sufficient power, are treaties of state, and obligatory with respect to the whole nation (§ 186.); real treaties, made to subsist independently of the person who has concluded them, doubtless, oblige his successors, and the obligation imposed on the state passes successively to all its conductors, in proportion as they assume the public authority. It is the same with respect to the rights acquired by these treaties: they are acquired for the state, and successively pass to its conductors.

§ 191.
That the obligations and rights resulting from a real treaty pass to the successors.

It is a pretty general custom for the successor to confirm, or renew even real alliances, concluded by his predecessors: and prudence requires, that this precaution should not be neglected, since men lay a greater stress on an obligation they themselves have contracted, than on one imposed on them by others, or to which they have only tacitly agreed. This is because they believe their word engaged in the first, and only their conscience in the other.

The treaties that have no relation to repeated oaths, but to transitory acts, and that are suddenly concluded; these treaties, if it is not proper to call them by another name (see § 153.): these conventions, these pacts, which are accomplished once for all, and not by successive acts, are no sooner executed, than they are completed and perfected. If they are valid, they have in their own nature a perpetual and irrevocable effect: we have not them in view when we enquire, whether a treaty be real or personal. Puffendorf * gives us rules in this inquiry, "1. That the successors ought to keep the treaties of peace concluded by their predecessors. 2. That a successor should keep all the lawful conventions, by which his predecessor has transferred any right to a third." This is apparently leaving the question; it is only saying that what is done with validity by a prince, cannot be annulled by his successors: who doubts it? The treaty of peace is in its own nature made to last perpetually, and as soon as it is once duly concluded and ratified, it is an affair that is perfected; it must be accomplished on both sides, and observed according to its tenor. If it is executed upon the spot, every thing is concluded. But if the treaty contains engagements with respect to successive and repeated oaths, it will be always proper to examine, according to the rules we have laid down, whether it be in this respect real or personal; whether the contracting

§ 192.
Of treaties accomplished once for all, and perfected.

* Law of Nature and Nations, Book VIII. Chap. IX. § 3.

parties have resolved to oblige their successors to swear to them; or whether they have only promised for the time of their reign. In the same manner, as soon as a right is transferred by a lawful convention, it no longer belongs to the state that has ceded it: the affair is concluded and terminated. But if the successor finds any fault in the act, and proves it, he is not to pretend that the convention is not obligatory with respect to him, and refuse to accomplish it; he is to shew, that it has not been made; for an act defective and invalid is null, and the same as if it never had been.

§ 193.
Of treaties
already ac-
complished
on the one
part.

The third rule given by Puffendorf, is no less useless with respect to this question; it declares, "That if the other ally having already executed something to which he was bound by the virtue of the treaty, the king happening to die before he had accomplished, in his turn, what he had engaged to perform, his successor is indispensably obliged to perform it. For what the other ally has executed under the condition of receiving an equivalent, having turned to the advantage of the state, or at least having been done with that view, it is clear, that if the one does not perform what he has stipulated, the other then acquires the same right as the man who is paid what he did not owe, and therefore the successor is obliged to make him an intire recompence, for what he has done or given, or to adhere himself to what his predecessor has engaged to perform." All this, I say, is foreign to our question. If the alliance is real, it subsists notwithstanding the death of one of the contracting parties; if it is personal, it expires with them, or with one of them (§ 183). But when a personal alliance comes to be furnished in this manner, the knowing to what one of the allied states is bound, in case the other has already executed something by virtue of the treaty, is another question, and is to be determined by other principles. It is necessary to distinguish the nature of what has been done to accomplish the treaty. If it relates to those determined, and certain loans which they have reciprocally promised each other by way of an equivalent, there is no doubt that he who has received, ought to give what he has promised in return, if he would adhere to the agreement, and is obliged to adhere to it; if he is not obliged, and is unwilling to adhere to it, he ought to restore what he has received, to put things into their primitive state; or to recompence the ally who has given them. To act otherwise, would be to detain what belongs to another. This not the case with the man who has paid what he did not owe, but of one who has paid before-hand for a thing that has not been delivered to him. But if the personal treaty requires uncertain and contingent loans that are to be accomplished, as occasions offer, these promises are not obligatory except in cases where they are to be fulfilled when presented; the return of the like assistance is also only due upon occasions, and the end of the alliance being answered, nobody is bound to any thing. In a defensive alliance, for instance, two kings reciprocally

cally promise each other a gratuitous assistance for the term of their lives : one of them is attacked : he is succoured by his ally, and dies before he has an opportunity to succour him in his turn : the alliance is ended, and the successor of the deceased is not obliged to perform any thing, except his being certainly bound in gratitude to make a suitable return to the sovereign, who has given a salutary assistance to the state. And it must not be believed that the ally, who has given the assistance without receiving any, will think himself injured by the alliance. This treaty was one of those adventitious contracts where the advantages or disadvantages depend on fortune : he might have gained as he has lost.

We might here propose another question. The personal alliance expiring at the death of one of the allies, if the survivor thinking it ought to subsist with the successor, fulfils the treaty on his part, defends his country, saves some of his fortresses, or furnishes provisions for his army, what ought the sovereign to do that is thus succoured ? He ought, doubtless, either to suffer the alliance to subsist, as the ally of his predecessor has believed that it ought to do, and this will be a tacit renewal and extension of the treaty ; or to pay for the real service he has received, according to a just estimation of its importance, if he would not continue that alliance. This then would be the case in which we should say with Puffendorf, that he who has rendered such a service, has acquired the right of a man who has paid what he did not owe.

The duration of a personal alliance being restrained to the person of the contracting sovereigns, if one of them ceases to reign from any cause whatsoever, the alliance is ended : for they have contracted in quality of sovereigns, and he who ceases to reign, no longer exists as a sovereign, though he lives still as man.

Kings do not always treat directly and solely for their kingdoms ; sometimes in virtue of the power they have in their hands, they make treaties relative to their own persons, or their families ; and this they may lawfully do ; the safety and advantage of the sovereign, properly understood, consisting in the welfare of the state. These treaties are personal in their own nature, and perish with the king. Such is an alliance made for the defence of the king and his family.

It is asked, if that alliance subsists with the king and the royal family, when by some revolution they are deprived of their crown ? We have lately remarked, (§ 194.) that a personal alliance expires with the reign of him who contracted it : but that is to be understood of an alliance with the state, limited as to its duration, to the reign of the contracting king. This, of which we are here speaking, is of another nature. For though it binds the state, since it is bound by all the public acts of its sovereign, it is made directly in favour of the king, and his family ; it would therefore be absurd for it to terminate at the moment when they have need of it, and at an event against which it was made. Besides, the king does not lose his quality merely by the loss of his kingdom. If he is stripped of it unjustly by an usurper, or

§ 194.
The personal alliance expires if one of the contracting powers ceases to reign.

§ 195.
Of treaties in their own nature personal.

§ 196.
Of an alliance concluded for the defence of the king and the royal family.

by rebels, he preserves his rights, in the number of which are his alliances.

But who shall judge if the king be dethroned lawfully or by violence? An independent nation acknowledges no judge. If the body of the nation declares the king deprived of his rights by the abuse he has made of them, and deposes him, it may justly do it when its grievances are well founded, and no other power has a right to censure it. The personal ally of this king ought not then to assist him against the nation that has made use of its right in deposing him: if he attempts it, he injures that nation. England declared war against Louis XIV. in the year 1688, for supporting the interest of James II. who was deposed in form, by the nation. The same country declared war against him a second time at the beginning of the present century, because that prince acknowledged the son of the deposed James, under the name of James III. In doubtful cases, and when the body of the nation has not pronounced, or has not pronounced freely, a sovereign may naturally support and defend an ally, and it is then that the voluntary law of nations subsists between different states. The party that has driven out the king, pretends to have right on its side: this unhappy king and his ally, flatter themselves with having the same advantage, and as they have no common judge upon earth, they have no other method to take, but to apply to arms to terminate the dispute: they therefore engage in a formal war.

In short, when the foreign prince has faithfully fulfilled his engagements towards an unfortunate monarch, when he has done in his defence, or to procure his restoration, all he was obliged to perform, in virtue of the alliance; if his efforts are ineffectual, the dethroned prince cannot require him to support an endless war in his favour, or expect that he will eternally remain the enemy of the nation, or of the sovereign who has deprived him of the throne. He must think of peace, abandon the ally, and consider him as having himself abandoned his right, through necessity. Thus Louis XIV. was obliged to abandon James II. and to acknowledge king William, though he had at first treated him as an usurper.

§ 197.
What is the
obligation
of a real
alliance,
when the
king who
is the ally
is driven
from the
throne.

The same question presents itself in real alliances, and in general, in all alliances made with the state, and not in particular with a king for the defence of his person. An ally ought doubtless to be defended against every invasion, against every foreign violence, and even against his rebellious subjects; in the same manner a republic ought to be defended against the enterprises of one who attempts to destroy the public liberty. But it ought to be remembered, that an ally of the state, or the nation, is not its judge. If the nation has deposed its king in form, if the people of a republic have driven out their magistrates, and set themselves at liberty, or acknowledged the authority of an usurper, either expressly or tacitly; to oppose these domestic regulations, by disputing their justice or validity, would be to interfere in the government of the nation, and to do it an injury (see § 54. and

and following of this book.) The ally remains the ally of the state, notwithstanding the change that has happened in it. However, when this change renders the alliance useless, dangerous, or disagreeable, it may renounce it: for it may lay upon a good foundation, that it would not have entered into an alliance with that nation, had it been under the present form of government.

We may say here, what we have said on a personal alliance: however just the cause of that king may be, who is driven from the throne, either by his subjects or by a foreign usurper, his allies are not obliged to support an eternal war in his favour. After having made ineffectual efforts to restore him, they must at length give peace to their people, and come to an accommodation with the usurper, and for that purpose treat with him as with a lawful sovereign. Louis XIV. exhausted by a bloody and unsuccessful war, offered at Gertruidenburg, to abandon his grandson, whom he had placed on the throne of Spain; and when affairs had changed their appearance, Charles of Austria, the rival of Philip, saw himself, in his turn, abandoned by his allies. They grew weary of exhausting their states in order to give him the possession of a crown which they believed to be his due, but which to all appearance they should never be able to procure for him.

C H A P. XIII.

Of the Dissolution and Renewal of Treaties.

THE alliance is ended as soon as the term is expired. This term is sometimes fixed, when an alliance is made for a certain number of years, and sometimes it is uncertain, as in personal alliances, the duration of which depends on the lives of the contracting powers. The term is likewise uncertain when two or more sovereigns form an alliance, with a view to some particular affair; for instance, to drive a barbarous nation from a country it had invaded, to restore a sovereign to his throne, &c. The end of this alliance is affixed to the completion of the enterprise for which it was formed. Thus in the last example, when the sovereign is restored, and so firmly seated on his throne, that he may remain in the tranquil possession of it, the alliance only formed for his restoration is ended. But if the enterprise does not succeed, the alliance is terminated, when they acknowledge the impossibility of executing it; for it is necessary to renounce an enterprise, when its execution is perceived to be impossible.

A treaty made for a time may be renewed by the common consent of the allies, which is shewn either in an express manner, or tacitly. When the treaty is expressly renewed, it is the same as if one altogether new was made.

§ 198.
Of the expiration of the term of alliances.

§ 199.
Of the renewal of treaties.

The tacit renewal is not easily presumed, for engagements of this importance well deserve an express consent. The tacit renewal can then only be founded on acts of such a nature, that cannot be performed but in virtue of the treaty. Still, the thing is not without difficulty; for according to the circumstances and nature of the act, they may be able to found only a simple continuation, or an extension of the treaty: this is very far from a renewal, especially as to the term. For example, England has a treaty of subsidies with a prince of Germany, who is to maintain, during ten years, a stated number of troops to be at the disposal of that crown, on condition of his receiving every year a certain sum. The ten years being expired, the king of England causes the sum stipulated for one year to be paid, the ally receives it: the treaty is tacitly continued for one year; but it cannot be said to be renewed; for what has passed that year, does not impose an obligation of doing as much for ten years following. But supposing the sovereign has agreed with a neighbouring state to give him a million for having a right to keep a garrison in one of his strong places during ten years, the term being expired, instead of withdrawing his garrison, he delivers a new million, and his ally accepts it: the treaty, in this case, is tacitly renewed.

When the term for which the treaty was made is expired, each of the allies is perfectly free, and may accept or refuse to renew it, as he shall think proper. However, it must be confessed, that after having reaped almost all the advantages of a treaty, to refuse to renew it, without strong and just reasons, when he believes he shall have no more need of it, and when he foresees that the time is come for his ally, in his turn, to reap advantages from it, this conduct would shew but little honesty; it would be unworthy of the generosity which so well becomes sovereigns, and very distant from those sentiments of gratitude and friendship that are due to an injured and faithful ally. It is but too common to see great powers, on their elevation, neglect those who have assisted them to arrive at it.

§ 200.
How a treaty is broken when it is violated by one of the contracting powers.

Treaties contain promises that are perfect and reciprocal. If one of the allies fails in his engagements, the other may constrain him to fulfil them; this is the right derived from a perfect promise. But if he has no other way than that of arms to constrain an ally to keep his word, it is sometimes more expedient to disengage himself from his promises, and to break the treaty. He has undoubtedly a right to do this, having promised only upon condition that his ally shall accomplish, on his side, every thing he is obliged to perform. The ally offended or injured in what relates to the treaty, may then chuse either to oblige the perfidious ally to fulfil his engagements, or declare the treaty broken, by the violation of it. Prudence, and a wise policy, must direct him what he ought to do on a particular occasion.

§ 201.
The violation of one treaty does not break another.

But when the allies have two or more treaties, different and independent of each other, the violation of one of the treaties, does not directly disengage the party injured, from the obligation

gation he has contracted in the others. For the promises contained in these, do not depend on those included in the violated treaty. But the offended ally may menace him who fails in one treaty to renounce, on his side, all the others by which they are united, and put his menace in force, if the other pays no regard to his remonstrances. For if any one ravages from me, or refuses to allow me my right, I may, in a state of nature, in order to oblige him to do me justice, to punish him, or to indemnify myself, deprive him also of some of his rights, or seize and detain them till I have obtained intire satisfaction. But if arms are taken up, to obtain justice for this violated treaty, the offended begins by stripping his enemy of all the rights which he had acquired by treaty: and we shall see, in treating of war, that he may do this with justice.

Some* would extend what we have just said to the several articles of a treaty that have no connection with the article that has been violated, saying we ought to consider these different articles, as so many particular treaties concluded at the same time. They pretend therefore, that if one of the allies breaks an article of the treaty, the other has not immediately a right to break the intire treaty; but that he may either refuse, in his turn, what he had promised with a view to the violated article, or oblige his ally to fulfil his promises, if that may be done, if not to repair the damage; and for this purpose it is permitted to threaten him to renounce the entire treaty: a menace that he may lawfully put in execution, if it be despised. Such is, doubtless, the conduct which prudence, moderation, the love of peace, and charity would commonly prescribe to nations. Who will deny this, and madly advance that sovereigns are allowed suddenly to have recourse to arms, or only to break every treaty of alliance for the least subject of complaint? But the case here is about a right, and not about the steps that ought to be taken to obtain justice; besides, the principle upon which such a decision is founded is absolutely unsupportable. We cannot consider the several articles of the same treaty as so many particular and independent treaties: for though we do not see the immediate connection between every one of these articles, they are all connected by this common relation, that the contracting powers pass them with a view to each other, by way of compensation. I should never perhaps have passed this article if my ally had not granted me another, which, in its own nature, has no relation to it. Every thing comprehended in the same treaty has then the force and nature of reciprocal promises, at least if they are not excepted in due form. Grotius says very well, "that all the articles of a treaty have the force of conditions, which by a default are rendered null †." He adds, that "this clause is sometimes inserted, that a violation of some one of the articles shall not break the whole, in order

§ 202.

That the violation of one article in a treaty may occasion the breaking the whole.

* See *Wolffius Jus Gent.* § 432.
II. Cap. XV. § 15.

† *Grotius de Jure Belli & Pacis, Lib.*

"that one of the parties should not get rid of his engagement on account of a small offence." This precaution is extremely wise, and very conformable to the care which nations ought to take of preserving peace, and rendering their alliances durable.

§ 203.
The treaty is void by the destruction of one of the contracting powers.

In the same manner, as when a personal treaty expires at the death of a king, the real treaty is abolished, if one of the allied nations is destroyed; that is, not only if the men who compose it happen also to perish, but also if it loses, from any cause whatsoever, its national quality, or that of a political and independent society. Thus when a state is destroyed, and the people are dispersed, or when they are subdued by a conqueror, all their treaties perish with the public power that had contracted them. But we ought not here to confound the treaties or alliances, which bearing the obligation of reciprocal advantages, can only subsist by the preservation of the contracting powers, together with those contracts that give a right acquired and completed, independently of every mutual advantage. If, for instance, a nation has ceded for ever to a neighbouring prince, the right of fishing in a river, or that of keeping a garrison in a fortress, that prince does not lose his right, even though the nation, from which he has received it, happens to be subdued, or passes, in any other manner, under a foreign dominion. His rights does not depend on the preservation of that nation; it had alienated them, and he who has conquered it can only take what belonged to it. In the same manner, the debts of a nation, or those for which the sovereign has mortgaged some of his towns or provinces are not extinguished by the conquest. The king of Prussia, on acquiring Silesia by conquest, and by the treaty of Breslau, took upon himself the debts for which that province was engaged to the English merchants. In fact, he could only conquer there the rights of the house of Austria, and he could only take Silesia as he found it at the time of the conquest, with its rights and burthens. To refuse the payment of the debts of the country he had subdued, would have been to rob the creditors with whom he was not at war.

§ 204.
Of the alliances of a state that has at length passed under the protection of another.

Any nation or state whatsoever not being able to make any treaty contrary to those by which it is actually bound (§ 165.), it cannot put itself under the protection of another, without reserving all its alliances, and all its subsisting treaties. For the convention by which a state puts itself under the protection of another sovereign, is a treaty (§ 175.); if it does it freely, it ought to do it in such a manner, as that the new treaty may be of no prejudice to those that are antient. We have seen (§ 176.) what rights it receives from the care of its own preservation, in case of necessity.

The alliances of a nation are not then destroyed, when it puts itself under the protection of another, unless they are incompatible with the conditions of that protection; its obligation subsists towards its ancient allies, and these remain bound by such obligation

to it, while it has not put itself out of the state of fulfilling its engagements towards them.

When necessity constrains a people to put themselves under the protection of a foreign power, and to promise him the assistance of all their forces, for and against any other power, without excepting their allies; their ancient alliances subsist, so far as they are not incompatible with the new treaty of protection. But if the case should happen, that an ancient ally enters into a war with the protector, the protected state will be obliged to declare for this last, to which it is bound by stricter obligations, and by a treaty which derogates from all the others, in case they happen to clash. Thus the Nepefinians having been constrained to submit to the Etrurians, thought themselves afterwards obliged to adhere to their treaty of submission or capitulation, preferably to the alliance they had contracted with the Romans: *Postquam deductionis, quam societatis, fides sanctor erat*, says Livy*.

In short, as treaties are made by the common consent of the parties, they may also be dissolved by a common agreement, and by the free consent of the contracting powers; and though even a third should find himself interested in the preservation of the treaty, and would suffer by its being broken, if he has not entered into it, and nothing has been directly promised to him, those who have reciprocally made promises that would turn to the advantage of this third, may also reciprocally discharge themselves from them, without consulting him, or without his having a right to oppose them. Two monarchs have reciprocally promised each other to join their forces for the defence of a neighbouring city: that city receives advantage from their succours; but it has no right to it, and as soon as the two monarchs resolve to dispense with each others performance, it would be deprived of it, without having any cause to complain, since it had received no promise.

§ 205.
Treaties dissolved by common agreement.

C H A P. XIV.

Of other public Conventions, of those that are made by inferior Powers, in particular of the Agreement called in Latin Sponsio, and of Conventions of Sovereigns with private Persons.

THE public pacts called conventions, articles of agreement, &c. when they are made between sovereigns, differ from treaties only in their object (§ 153.) All we have said of the validity of treaties, of their execution, of dissolving them, and of the obligations and rights that flow from them, are applicable to the various conventions which sovereigns may conclude with each other. Treaties, conventions, and agreements, are all public engagements, in regard to which there is but one, and the same

§ 206.
Of conventions made by sovereigns.

* Lib. VI. Cap. X.

right, and the same rules. We shall not here have recourse to tedious repetitions. It would be equally useless to enter into an enumeration of the various kinds of these conventions which are always of the same nature, and differ only in the matter that is the subject of them.

§ 207.
Of those
made by
inferior
powers.

But there are public conventions made by the inferior powers, either in virtue of an express mandate from the sovereign, or by the power with which they are intrusted, by the terms of their commission, and according as they are allowed, or required by the nature of the affairs with which they are entrusted.

We call *inferior* or *subordinate powers*, public persons, who exercise some part of the government, in the name, and under the authority of the sovereign: such are magistrates established for the administration of justice, generals of armies, and ministers of state.

When these persons form a convention by the express order of the sovereign, in a particular case, and are furnished with his power, the convention is made in the name of the sovereign himself, who contracts by the mediation and ministry of his delegate or proxy: this is the case we have mentioned in § 156.

But public persons, in virtue of their office, or the commission given them, have also themselves the power of making conventions on public affairs, exercising in this, the right and authority of the superior power that has established them. This power they receive two ways; it is either ascribed to them in express terms by the sovereign, or it flows naturally from their commission itself; the nature of the affairs with which these persons are entrusted, requiring that they should have the power of making such conventions, especially in cases where they cannot stay for the orders of the sovereign. Thus the governor of a place, and the general who lays siege to it, have the power of agreeing about the capitulation: and every thing they thus conclude within the terms of their commission, is obligatory to the state or the sovereign who has committed to them the power. These sort of conventions taking place principally in war, we shall treat of them more at large in Book III.

§ 208.
Of treaties
concluded
by a public
person,
without or-
ders from
the sove-
reign, or
without a
sufficient
power.

If a public person, an ambassador, or a general of an army, concludes a treaty, or a convention without orders from the sovereign, or without being authorised to do it by the power of his office, he goes beyond the bounds of his commission, and the treaty is null, as being made without a sufficient power (§ 157.): it cannot take place without the express or tacit ratification of the sovereign. The express ratification is an act by which the sovereign approves the treaty, and engages to observe it. The tacit ratification is taken from certain steps which the sovereign is justly presumed to take, only in virtue of the treaty, and which he could not take, if he did not consider it as concluded and agreed upon. Thus a peace being signed by the public ministers, who had even exceeded the orders of their sovereigns, if one of these causes troops to pass, on the footing of friends, through

through the territories of his reconciled enemy, he tacitly ratifies the treaty of peace. But if the ratification of the sovereign has been reserved in order to be approved by an express ratification, it is necessary that it should be mediated in this manner to give the treaty all its force.

People call in Latin *sponsio*, an agreement relating to affairs of state, made by a public person, who goes beyond the terms of his commission, and acts without the orders or command of the sovereign. He who treats in this manner for the state, without having a commission, promises by this means to take such measures, that the state, or the sovereign, shall approve and ratify the agreement; otherwise his agreement would be vain and illusive. The foundation of this agreement can be no other on either side, than the hope of the ratification.

The Roman history furnishes us with examples of this kind of agreement: let us stop at the most famous of them, at that of the Caudine Forks, which has been discussed by the most illustrious authors. The consuls T. Veturius Calvinus and Sp. Postumius, with the Roman army, being engaged in the defiles of the Caudine Fork without hopes of escaping, concluded a shameful agreement with the Samnites; but informing them, that they could not make a true public treaty (*fœdus*) without orders from the Roman people, without the *fœciales*, and the ceremonies consecrated by custom; the Samnite general contented himself with exacting a promise from the consuls and principal officers of the army, and with making them give six hundred hostages; and having made the Roman army lay down their arms, and caused them to pass under the yoke, sent them away. The senate, however, refused to accept the treaty; delivered those who had concluded it to the Samnites, who refused to receive them, and then thought themselves free from all obligation, and covered from all reproach. Authors have *entertained very different sentiments of this conduct. Some assert, that if Rome was resolved not to ratify the treaty, she ought to have put things in the same situation they were in before the agreement, by sending the entire army into the Caudine Forks; and this the Samnites maintained. I confess that I am not intirely satisfied with the reasonings I have found on this question, even in the authors whose superiority I fully acknowledge. Let us, however, endeavour, by taking advantage of their observations, to set the affair in a new light.

It presents two questions; first, to what those were bound who made the agreement (*sponsor*) if the state disowned it? Secondly, what obligation the state itself was under? But first it is necessary to observe, with Grotius †, that the state was not bound by an agreement of that nature. This is manifest, even from the definition of the agreement called *sponsio*. The state had not given orders to conclude it, and had not conferred the power of

§ 209.

Of the agreement called *sponsio*.

§ 210.

The states not bound by a like agreement.

* Titus Livy, Lib. IX.

† De Jure Belli & Pacis, Lib. II. Cap. XV. § 16.

doing

doing it in any manner, either expressly, by command, or by full powers, or tacitly, by a natural or necessary consequence of the authority trusted to him who made the agreement (*sponsori*). A general of the army might very well, in virtue of his commission, make use of the power of forming particular conventions in the cases that presented themselves, of pacts relative to himself, to his troops, or to the occurrences of war; but not that of concluding a peace. He might bind himself, and the troops under his command, on all the occasions where his functions required that he should have the power of treating; but he could not bind the state beyond the terms of his commission.

§ 211.
To what
the pro-
miser is
bound when
it is dis-
owned.

Let us now see to what the person promising (*sponsor*) is bound, when the state disowns the agreement. We ought not here to reason on what would take place in the law of nature between private persons; the nature of things, and the conditions of the contracting powers, necessarily make a great difference between them. It is certain, that between individuals, he who merely and simply promises in the name of another, to do any thing without having his commission, is obliged, if that other disowns it, to accomplish himself what he has promised, to make an equivalent, or to restore things to their first state, or, in short, fully to recompence him with whom he has treated, according to the various circumstances of the case: his promise (*sponsio*) can be no otherwise understood. But this is not the case with respect to a public person, who promises without orders, and without power for the performance of his sovereign. It relates to things that infinitely surpass his power, and all his faculties; to things which he can neither execute himself, nor cause to be executed, and for which he can neither offer an equivalent, or a proportionable recompence; he is not even at liberty to give the enemy what he has promised, without being authorised to do it: in short, it is no longer in his power to restore things intirely to their first state. He who treats with him, can hope for nothing of this nature. If the promiser deceives him, in saying, that he is sufficiently authorised, he has a right to punish him. But if, as the Roman consuls, at the Caudine Forks, the promiser acts with sincerity, informing him, that he has not the power of binding the state by a treaty; nothing else can be presumed, but that the other party gladly runs the risk of making a treaty that must become void, if it is not ratified; hoping that a regard for him who promised, and for the hostages, will induce the sovereign to ratify what had been thus concluded. If the event deceives his hopes, he can only complain of his imprudence. An eager desire of obtaining a peace on advantageous conditions, and the bait of some advantageous presents, might alone induce him to make so hazardous an agreement. This was judiciously observed by the consul Postumius himself, after his return to Rome. We may see the speech which Titus Livy represents him making to the senate. "Your generals, said he, and those of the enemy, have equally committed a mistake. We, in imprudently in-

"volv.

"volving ourselves in a bad situation; they in suffering to escape them, a victory which the nature of the places gave them, "still distrusting their own advantages, and hasting, at any price, "to disarm men always formidable while they had arms in their "hands. Why did not they keep us shut up in our camp? Why "did not they send to Rome, in order to treat securely of the "peace, with the senate and the people?"

It is manifest that the Samnites contented themselves with the hope, that the engagement which the consuls and principal officers had entered into, and the desire of saving six hundred knights, left as hostages, would induce the Romans to ratify the agreement, considering, that let what would happen, they should still have these six hundred hostages, with the arms and baggage of the army, and the vain, or rather, as it proved by its consequences, the fatal glory, of having made them pass under the yoke.

Under what obligation then were the consuls, and all who made these promises (*sponsores*)? They themselves judged that they ought to be delivered up to the Samnites. This was not the natural consequence of the agreement (*sponsio*); and according to the observation we have just made, it does not appear, that the promiser having promised things which the acceptor well knew was not in his power, was obliged, on his promise being disowned, to deliver himself up by way of recompence. But as he might expressly engage himself, this being within the terms of his power or commission; the custom of those times had doubtless rendered this engagement a tacit clause of the agreement called *sponsio*, since the Romans delivered up all the *sponsores*; all those who had promised; this was a maxim of their *facial laws* *.

If the *sponser* had not expressly engaged to deliver himself up, and if the received custom did not impose it upon him as a law, all that he seems to have been obliged to do in conformity with his promise, was honestly to do whatever was lawful, to engage the sovereign to ratify what he had promised: and there is no doubt that, provided the treaty was ever so little equitable or advantageous to the state, it would be supportable in consideration of the misfortune from which he had preserved it. To propose to spare the state a considerable shock, by means of a treaty, and soon after to advise the sovereign not to ratify it, not because it is insupportable, but because an advantage might be taken of its having been done without power, must be a fraudulent proceeding and a shameful abuse of the faith of treaties. But what will the general do, who, in order to save his army, has been forced

* I have said in my Preface, that the facial law of the Romans was their law of war. The college of the *faciales* was consulted on the causes that might authorize their undertaking a war, and on the question it might give rise to: it had also the care of the ceremonies on the declaration of war, and treaties of peace. They likewise consulted the *faciales*, and made use of their ministry in all the public treaties.

to conclude a pernicious treaty, or one that reflects dishonour on the state? Will he advise the sovereign to ratify it? He will content himself with laying open the motives of his conduct, and the necessity that obliged him to treat; he will shew as Postumius did, that he alone is bound, and will desire to be disowned and delivered up for the public safety. If the enemy is deceived, it is through his own folly. Ought the general to have informed him, that according to all appearance, his promises would not be ratified? This would be requiring too much. It is sufficient, if he did not impose upon him by boasting of more extensive powers than he had, and that he confined himself to the taking advantage of his proposals, without inducing him to treat by deceitful hopes. — It is for the enemy to take all possible securities; if he neglects them, why should they not take advantage of his imprudence, as of one of the favours of fortune? “It is she, said Postumius, who has saved our army, after having put it in danger. The enemy’s head was turned in his property, and his advantages have been no more to him than a pleasant dream.”

If the Samnites had only required from the generals, and the Roman army, such engagement as they had a power to enter into by the nature of their state, and their commission; if they had obliged them to surrender themselves prisoners of war, or, not being able to keep them all, had dismissed them upon their promise not to bear arms against them for some years, in case Rome should refuse to ratify the peace; the agreement would have been valid, as being made with sufficient power, and the whole army would have been bound to observe it; for it is necessary that the troops, or their officers, should have the power of entering into a contract on these occasions, and upon this footing. This is the case of capitulations, of which we shall speak in treating of war.

If the promiser has made an equitable and honourable convention, on an affair, which from its very nature, he has the power to recompense him with whom he has treated, in case the convention is disallowed, he is presumed to have engaged to make that recompence, and this he ought to do, to discharge his promise, as did Fabius Maximus in the example mentioned by Grotius*. But there are occasions in which the sovereign may forbid his doing it, and his giving any thing to the enemies of the state.

We have shewn, that a state cannot be bound by an agreement made without its order, and without its having granted any power for that purpose. But is it absolutely under no obligation? This is what we are now to examine. If things are in their first situation, the state or the sovereign may disown the

§ 213.
To what
the sove-
reign is
bound.

* Lib. II. Chap. XV. § 16. Fabius Maximus having concluded an agreement with the enemy which the senate disapproved, sold a piece of land, for which he received two hundred thousand sesterces, to free himself from his promise. It relates to the ransom of the prisoners. *Aurel. Victor, de Viris Illust.* Plutarch’s life of Fabius Maximus.

treaty, which falls by this disavowal, and is as if it had never been. But the sovereign ought to manifest his resolution as soon as the treaty comes to his knowledge; not indeed that his silence alone can give validity to a convention, that cannot have it without his approbation; but it would be unjust for him to give time to the other party to execute, on his side, an agreement which he would not ratify.

If he has already done any thing in virtue of the agreement; if the party, who has treated with the *sponsor*, has on his side fulfilled his engagements, either in the whole, or in part, ought he to be recompensed; or things to be restored to their first state on disowning the treaty; or will it be permitted to reap the fruits of it, at the same time that the ratification is refused? We should here distinguish the nature of the things that have been executed, and that of the advantages that have accrued from them to the state. He who having treated with a public person not furnished with sufficient power, and executes the agreement on his side without staying for its ratification, is guilty of an imprudence, and a very great fault, to which he has not been induced by the state with which he thought he had contracted: but if he has given any thing, it cannot be retained, by taking advantage of its folly. When a state believing that it has concluded a peace with the enemy's general, has, in consequence of this, delivered up one of his strong places, or given a sum of money, the sovereign of that general ought, doubtless, to restore what he has received, if he is unwilling to ratify the agreement. If he acts otherwise, he enriches himself with another's property, and detains that property without having any title to it.

But if the agreement has given nothing to the state which it had not before; if, as in that of the Caudine Forks, all the advantage consists in being drawn from danger, and preserved from destruction, this is a fortunate advantage that may be improved without scruple. Who would refuse to be saved by the folly of his enemies? And who would think himself obliged to indemnify that enemy, for the advantage he had suffered to escape him, when he had not fraudulently contributed to his loss? The Samnites pretended, that if the Romans would not keep the treaty made by their consuls, they ought to send back the army to the Caudine Forks, and restore every thing to its former state: two tribunes of the people, who had been in the number of the *sponsors*, in order to avoid being delivered up, dared to maintain the same opinion; and some authors have declared themselves of their sentiments. What, shall the Samnites take advantage of conjectures to give law to the Romans, to snatch from them a shameful treaty! They were guilty of imprudence in treating with the consuls, who declared that they had not power to contract for the state; and they suffered the Roman army to escape, after having covered them with infamy: shall not the Romans take the advantage of the folly of an enemy, so void of generosity? Should they either ratify a shameful treaty, or restore

to that enemy advantages given them by the situation of places and which they lost merely by their own folly? Upon what principal can such a decision be founded? Had Rome promised any thing to the Samnites? Had she prevailed upon them to let her army go, and to wait for the ratification of the agreement made by the consuls? had she received any thing in virtue of that agreement, she would have been obliged to restore it, as we have already said on declaring the treaty null, because she would have possessed it without a title. But she had no share in the action of her enemies, she did not contribute to the great fault they had committed, and might as justly take advantage of it, as people in war do of all the mistakes of an unskilful general. Suppose that the conqueror, after having concluded a treaty with ministers who have expressly reserved the ratification to their master, should have the imprudence to abandon all his conquests without waiting for the ratification, ought he to have the goodness to put him in possession of them again, in case he did not chuse to ratify the treaty?

I however confess, and freely acknowledge, that if the enemy had suffered an intire army to escape, on the faith of an agreement they had concluded with the general, unprovided with sufficient power, and a simple *sponsor*; I confess, I say, that if that enemy had behaved generously, if they had not made use of their advantages to dictate shameful or too severe conditions, equity would have required, either that the state should have ratified the agreement, or concluded a new treaty, on just and reasonable conditions, giving up its pretensions so far as the public welfare might allow. For we ought never to abuse the generosity and noble confidence even of an enemy. Puffendorf* thinks, that the treaty at the Caudine Forks contained nothing that was too severe or insupportable. That author does not seem to make any great matter of that shame and ignominy that was cast on the whole republic. He did not see the full extent of the Roman policy, which would never permit them, in their greatest distresses, to accept a shameful treaty, or even to make peace as conquered: a sublime policy to which Rome owed all her grandeur.

Let us at length remark, that the inferior power having, without orders, and without authority, concluded an equitable and honourable treaty, to deliver the state from an imminent danger; the sovereign who, on seeing himself thus delivered, should refuse to ratify the treaty, not because he found it disadvantageous, but only to save himself from doing what is the price of his deliverance, would certainly act against all the rules of honour and equity. This would be a case in which we might apply the maxim *summum jus, summa injuria*.

To the example we have drawn from the Roman history, let us add a famous one taken from modern history: the Swiss, dissatisfied with France, entered into an alliance with the emperor

against Louis XII. and in the year 1513, made an irruption into Burgundy. They laid siege to Dijon. La Trimouille, who commanded in the place, fearing that he should be unable to save it, treated with the Swifs, and without waiting for a commission from the king, concluded an agreement, in virtue of which the king of France was to renounce his pretensions to the duchy of Milan, and to pay the Swifs, at certain times, the sum of six hundred thousand crowns; while the Swifs, on their side, were only obliged to return home, and they were at liberty to attack France again, if they thought proper. They received hostages, and departed. The king was very much dissatisfied with the treaty, though it had saved Dijon, and preserved the kingdom, which was in very great danger, and he refused to ratify it*. It is certain, that La Trimouille had exceeded the power he received from his commission, especially in promising that the king should renounce the duchy of Milan. He probably only proposed to get an enemy at a distance, that was more easily surprized into a negotiation than conquered by force of arms. Louis was not obliged to ratify and execute a treaty concluded without orders, and without powers; and if the Swifs were deceived, they ought to blame their own imprudence. But as it manifestly appeared, that La Trimouille did not behave towards them with fidelity, since he had deceived them on the subject of the hostages, giving them in that quality, men of the meanest rank, instead of four of the most distinguished citizens, whom he had promised†; the Swifs had therefore just reason not to conclude a peace, at least, as no recompence was made for this perfidy, either by delivering up him who was the author of it, or in any other manner.

The promises, the conventions, all the private contracts of the sovereign, are naturally subject to the same rules as those of private persons. If there arises any difficulty on this account, it is equally conformable to prudence, to the delicacy of sentiment that ought to be particularly conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state: this is the practice of all the states that are civilized and governed by laws.

The conventions and contracts made by the sovereign, with private persons who are foreigners, in his quality of sovereign, and in the name of the state, follow the rules we have given in respect to public treaties. In fact, when a sovereign enters into a contract with men who neither depend on him, nor on the state; whether it be with a private person, or with a nation, or sovereign, this does not produce any difference in their right. If the private person who has treated with a sovereign is his subject, the right is also much the same; but there is a difference in the manner of deciding the controversies which may arise from the

* Guichardin, *Boul. XII. Chap. II. De Watteville's Hist. of the Helvetic Confederacy, Part II. p. 185.* and following.

† See *De Watteville's Hist. of the Helvetic Confederacy, p. 190.*

contract. This private person being a subject of the state, is obliged to submit his pretensions to the established courts of justice. Authors add, that the sovereign may cancel these contracts, if he finds they are contrary to the public welfare. He may, doubtless, do it; but not from any reason taken from the particular nature of these contracts: this would be, either from the same reason that renders even a public treaty invalid, when it is fatal to the state, and contrary to the public safety, or in virtue of the eminent domain which gives the sovereign a right to dispose of the property of the citizens, with a view to the common safety. We speak here of an absolute sovereign. It appears, in the constitution of this state, who are the persons, and what is the power that has a right to contract in the name of the state, to exercise the supreme authority, and to declare what the public welfare demands.

§ 215.
They
oblige the
nation and
the suc-
cessors.

When a lawful power contracts in the name of the state, it lays an obligation on the nation itself, and consequently on all the future conductors of the society. When therefore a prince has the power of concluding a treaty in the name of the state, he lays an obligation on all his successors, and these are not less bound than himself to fulfil his engagements.

§ 216.
Of the debts
of the sove-
reign and
the state.

The conductor of the nation may have his private affairs, and his particular debts: these kind of debts he is obliged to pay out of his own private fortune. What he borrows for the service of the state, the debts contracted in the administration of public affairs, are contracts of strict right, obligatory with respect to the state and the whole nation. Nothing can dispense with the discharging of these debts. As soon as they have been contracted by a lawful power, the right of the creditor is not to be shaken. Whether the money borrowed has turned to the advantage of the state, or whether it has been dissipated in foolish expences, is not the business of him who has lent it: he has trusted his wealth to the nation, and the nation ought to restore it to him again: it is so much the worse for the state, if it has committed its affairs into bad hands.

However, this maxim has its bounds, founded even on the nature of the thing. The sovereign has not, in general, a power of making the body of the state bound for the debts he contracts, except they are for the welfare of the nation, and to enable him to provide for all occurrences. If he is absolute, he alone is the judge in all doubtful cases, what is required for the safety and welfare of the state: but if, without necessity, he contracts immense debts, capable of ruining the nation for ever, there is no doubt that the sovereign acts manifestly without a right, and those who have assisted him have trusted their money very ill. Nobody can presume to say, that a nation has ever been willing to submit so far as to suffer itself to be absolutely ruined by the caprice and foolish dissipations of its conductor.

As the debts of a nation can only be paid by contributions or taxes, the conductor of the sovereign, who is not intrusted with the right

right of levying taxes or contributions, or of raising supplies by his own authority, has not a right, by his borrowing, to involve the state in debts. Thus the king of England, who has the right of making peace and war, has not that of contracting national debts, without the concurrence of parliament, because he cannot, without their concurrence, raise any money on his people.

It is not with the donations of the sovereign as with his debts. § 217. When a sovereign has borrowed, without necessity, or for a very unnecessary use, the creditor has trusted his fortune with the state, and it is just that the state should restore it to him, if the creditor can reasonably presume that he lent it to the state. But when the sovereign gives the wealth of the state, some part of the domain, or a considerable fief, he has a right to do it only with a view to the public welfare, or on account of services rendered to the state, or for some other reasonable cause, in which the nation is concerned: if he has given, without just reasons, and without a lawful cause, he has given without power. The successor, or the state, may always revoke such a donation; and by this, they would do no injury to the person to whom it was given, since they take nothing from him which he had a right to possess. What we here say, is true of every sovereign to whom the law does not expressly give the free and absolute disposal of the wealth of the state: so dangerous a power is never founded on presumption.

The immunities and privileges conferred by the mere liberality of the sovereign, are a kind of donations, and may be revoked in the same manner, if they turn to the disadvantage of the state. But a sovereign cannot revoke them by his mere authority, except he be absolute; and even in this case, he ought to use his power soberly, and with equal prudence and equity. Immunities granted on account of, or with a view to some return, have the nature of a burthensome contract, and can only be revoked in case of abuse, or when they become contrary to the safety of the state. And if they are suppressed on this last account, those who enjoyed them ought to be recompensed.

C H A P. XV.

Of the Faith of Treaties.

THOUGH we have sufficiently established (§ 163, and 164.) § 218. the indispensable necessity of keeping promises, and observing treaties, the subject is of such importance, that we cannot omit considering it here in a more general view, as not only interesting to the contracting parties, but likewise to all nations, and the universal society of mankind. Of what is sacred among nations.

Every thing which the public safety renders inviolable, is sacred in society. Thus the person of the sovereign is sacred, because

the safety of the state requires that he should be in perfect security, and above the reach of all violence: thus the people of Rome declared the persons of their tribunes sacred, considering that it was essential to their safety that they should secure their defenders from all attempts, and place them even above fear. Every thing therefore which for the common safety of the people, and for the tranquillity and security of the human race, ought to be inviolable, is held sacred among nations.

§ 219.
Treaties
are sacred
between
nations.

Who can doubt that treaties are in the number of those things that are held sacred by nations? They determine the most important affairs; they give rules to the pretensions of sovereigns; they ought to make known the rights of nations; and to secure their most precious interests. Among bodies politic, and sovereigns who acknowledge no superior on earth, treaties are the only means of adjusting the various pretensions of each, of reducing them to a rule of knowing on what to depend, and where to fix. But treaties are only vain words, if nations do not consider them as respectable engagements, as inviolable rules to sovereigns, and as sacred throughout the whole earth.

§ 220.
The faith
of treaties
is sacred.

The faith of treaties, that firm and sincere resolution, that inviolable constancy in fulfilling engagements, of which declaration is made in a treaty, is then holy and sacred between the nations, whose safety and repose it secures: and if people would not be wanting to themselves, infamy would ever be the share of him who violates his faith.

§ 221.
He who
violates his
treaties,
violates the
law of na-
tions.

He who violates his treaties, violates at the same time the law of nations; for he despises the faith of treaties, that faith which the law of nations declares sacred, and he does all in his power to render it vain. Doubly guilty, he does an injury to his ally, he does an injury to all nations, and wounds the whole human race. "On the observation and execution of treaties, said a respectable sovereign, depend all the security which princes and states have with respect to each other, and we no longer depend on the conventions to be made, if those that are made were not maintained *."

§ 222.
The right
of nations
against him
who de-
spises the
faith of
treaties.

Thus all nations are interested to maintain the faith of treaties, to render them every where considered as sacred and inviolable; they have also a right to unite in order to humble him who shews that he despises them, who openly plays with them, who violates, and tramples them under his feet. This is a public enemy, who saps the foundations of the repose of nations, and of their common safety. But we ought to take care not to extend this maxim to the prejudice of the liberty and independence that belong to all nations. When a sovereign breaks his treaties, or refuses to fulfil them; this does not immediately imply, that he considers them as vain names, and that he despises the faith of treaties: he may have good reasons for thinking himself discharged from his

* Resolution of the States-general, of the 15th of March 1726, in answer to the Memoir of the Marquis de St. Philip, an ambassador of Spain.

engagements, and other sovereigns have not a right to judge him. It is he who fails in his engagements, on pretensions that are manifestly frivolous, or who does not even give himself the trouble to alledge his pretences, to colour over his conduct, and to cover his bad faith: such a sovereign deserves to be treated as the enemy of the human race.

In treating of religion, in the first book of this work, we could not avoid giving several instances of the enormous abuses the popes have formerly introduced by their authority. There appeared one that was equally injurious to all states, and inconsistent with the law of nations. Several popes have undertaken to break the treaties of sovereigns; they have dared to unloose a contracting power from his engagements, and to absolve him from the oath by which he has confirmed them. Cesarini, legate of pope Eugenius IV. resolving to break the treaty which Uladisslaus king of Poland and Hungary had concluded with the sultan Amurath, in the name of the pope, declared the king absolved from his oaths*. In these times of ignorance, people thought themselves really bound by nothing but by their oaths, and they attributed to the pope the power of absolving them from all kinds of oaths; Uladisslaus took arms against the Turks; but that prince, in other respects worthy of a better fate, paid dearly for his perfidy, or rather for his superstitious weakness: he perished with his army, near Varna: a loss fatal to Christendom, and which was drawn on by its spiritual head. On Uladisslaus was made this epitaph:

\$ 223.
The law
of nations
violated by
the popes.

*Romulidæ Cannas, ego Varnam clade notavi.
Discite, mortales, non temerare fidem.
Me nisi Pontifices jussissent rumpere Fœdus
Non ferret Scythicum Pannonis ora jugum.*

Pope John XII. declared null the oath mutually taken by the emperor Louis of Bavaria and his competitor Frederic of Austria, when the emperor set the other at liberty. Philip duke of Burgundy, abandoning the alliance of the English, was absolved from his oath by the pope at the council of Basil. And at the same time, when the revival of letters, and the establishment of the Reformation should have rendered the popes more circumspect, the legate Caraffe, in order to oblige Henry II. king of France, to revive the war, dared, in 1556, to absolve him from the oath he had made to observe the truce of Vaucelles †. The famous peace of Westphalia displeasing the pope, on many accounts, he did not confine himself to protesting against the articles of a treaty, in which all Europe was interested: he published a bull, in which, from his own certain knowledge, and full ecclesiastical power, he declared several articles of the treaty null, vain, invalid,

* History of Poland by the Chavelier de Solignac, Vol. IV. p. 112. He cites Dlugoff, Neugebauer, Sarnicki, Herbut, de Fultin, &c.

† See the French and German historians on these facts.

iniquitous, unjust, condemned, reprov'd, frivolous, without force and effect, and that nobody was bound to observe them or any of them, though they were strengthened by an oath.—This was not all; he assumes the tone of an absolute muster, and proceeds thus: *And nevertheless, from a greater precaution, and as much as need be, from the same motions, knowledge, deliberations, and plenitude of power, we condemn, reprove, break, annul, and deprive of all force and effect, the said articles, and all the other things prejudicial to the above, &c. ** Who does not see, that these enterprizes of the popes, which were formerly very frequent, were violations the law of nations, and directly tended to destroy all the bands that could unite mankind, and to sap the foundations of their tranquillity, or to render the pope sole arbiter of their affairs?

§ 224.
This abuse
authorised
by princes.

But who is not struck with indignation at seeing this strange abuse authorised by princes themselves? In the treaty concluded at Vinciennes, between Charles V. king of France, and Robert Stuart king of Scotland, it was agreed, *that the pope should free the Scots from all the oaths they had taken in swearing to a truce with the English, and that he should promise never to discharge the French and Scots from the oaths they were going to make, in swearing to the new treaty †.*

§ 225.
The use of
an oath in
treaties. it
does not
constitute
the obli-
gation.

The custom once generally received of swearing to the observation of treaties, had furnished the popes with a pretence for attributing to themselves the power of breaking them, by absolving the contracting powers from their oaths. Children themselves now know that an oath does not constitute the obligation to keep a promise or a treaty: it gives only an additional strength to that obligation, by calling God to bear witness. A sensible and an honest man does not think himself less bound by his word alone, and by his faith given, than if he had added the sanction of an oath. Cicero would not have people make much difference between one guilty of perjury and a liar. “The habit of lying, says that great man, makes perjury easy. If we may prevail upon any one to break his word, will it be very difficult to persuade him to be guilty of perjury? As soon as we once deviate from the truth, the religion of an oath is no longer a sufficient curb. What man will be bound by the invocation of the gods, if he pays no respect to his faith and his conscience? For this reason, the gods reserve the same punishment for the liar, and for him who is guilty of perjury. For it must not be imagined, that there is any virtue in the form of the oath, that irritates the immortal gods against the perjured; it is rather on account of the perfidy and malice of him who prepares a snare for the fidelity of others ‡.”

The

* History of the treaty of Westphalia by Father Bougeant, in 12mo, Vol. VI. p. 413, and 414.

† Chaffy's History of Charles V. p. 282, and 283.

‡ At quid inter illos perjurum & mendacem. Qui mentiri solet, pejus est confectus, quem ego ut mentiat, inducere possum; ut perjerit, exorare facile potero.

The oath does not then produce a new obligation : it only strengthens that imposed by the treaty ; and it in every thing follows the fate of that obligation : a real and superabundant obligation while the treaty is in force, but becomes null with the treaty itself.

The oath is a personal act ; it can therefore only regard the person of him who swears, whether he swears himself, or gives commission to another to swear in his name. However, as this act does not produce a new obligation, it makes no change in the nature of the treaty. Thus an alliance sworn to, is only sworn to for him who made it : but if it be a real alliance, it subsists after him, and passes to his successors, as an alliance not confirmed by an oath.

For the same reason, since the oath can impose no other obligation than that which results from the treaty itself, it gives no pre-eminence to one treaty, to the prejudice of those that are not sworn to. And as in the case where two treaties clash with each other, the more ancient ally ought to be preferred (§ 167.), the same rule should be observed, even when the last treaty has been confirmed by an oath. In the same manner, since it is not allowable to engage in treaties contrary to those that subsist (§ 165.), the oath will not justify such treaties, nor give them an advantage over those that are contrary to them : this would be a commodious means, by which princes might deliver themselves from their engagements.

Thus also an oath cannot render a treaty valid that is not so, justify a treaty unjust in itself, nor lay an obligation to fulfil a treaty lawfully concluded, when a case is presented where its observation would be unlawful ; as for instance, if the ally to whom succours has been promised, undertakes a war that is manifestly unjust. In short, every treaty made for a dishonest cause (§ 161.), every treaty prejudicial to the state (§ 160.), or contrary to the fundamental laws (Book I. § 265.), being null in its own nature, the oath that may have been added to such a treaty is also null, and falls with the act it was intended to strengthen.

The asseverations used in entering into engagements are forms of expression appointed to give the greater force to promises. Thus kings promise in *the most sacred manner, with good faith, solemnly, irrevocably*, and engage their *royal word*, &c. An honest man thinks himself sufficiently bound by his word alone : yet these asseverations are not useless ; they serve to shew, that princes engage with reflection, and the knowledge of what they are about ; and thence they render their infidelity more shameful.

potero nam qui semel à veritate deflexit, hic non majore religione ad perjurium, quam ad mendacium perducì consuevit. Quis enim deprecatione Deorum, non conscientia fide commonetur ? Propterea quæ pena ab Diis immortalibus perjuro, hæc eadem mendaci constituta est. Non enim ex pactiōe verborum quibus perjurandum comprehenditur, sed ex peritiā & malitiā, per quam insidiæ tenduntur alicui, Diis immortales hominibus irasci & succensere consueverunt. *Cicero. Orat. pro L. Roscio Comædo.*

Advantage should be taken of every thing among men whose fidelity is so uncertain; and since shame has a greater effect upon them than the sense of duty, it would be imprudent to neglect this method.

§ 230.
The faith of treaties does not depend on the difference of religion.

After what we have said above (§ 162.), we may dispense with proving that the faith of treaties has no relation to the difference of religion, and cannot in any manner depend upon it. The monstrous maxim, that *we ought to keep no faith with heretics*, might formerly raise its head amidst the madness of party, and the fury of superstition; but it is at present generally detested.

§ 231.
Precaution taken in preparing treaties.

If the security of him who stipulates for any thing in his own favour invites him to require precision, fullness, and the greatest clearness in the expressions; good faith demands, on the other hand, that each make known his promises clearly, and without the least ambiguity. It is barely sporting with the faith of treaties, to endeavour to dress them up in vague or equivocal terms; to slide into them ambiguous expressions; to reserve subjects of chicanery to surprise him with whom we treat, and to assault him with finess and bad faith. Leave an able man in these arts to glory in his happy talents, and to esteem himself a fine negotiator; reason, and the sacred law of nature, shew him to be as much beneath a vulgar cheat, as the majesty of kings is raised above private persons. True ability consists in guarding against surprises; never in making use of them.

§ 232.
Of subtrefuges in treaties.

Subterfuges in a treaty are not less contrary to good faith. Ferdinand the catholic king, having concluded a treaty with the archduke his son-in-law, thought to draw himself out of the affair by secret protestations against the same treaty. A peurile finess! which, without giving any right to that prince, only manifested his weakness and bad faith.

§ 233.
How far an interpretation manifestly false is contrary to the faith of treaties.

The rules that establish a lawful interpretation of treaties, are of such importance as to deserve to be the subject of a chapter. Let us here only observe, that a manifestly false interpretation is, in every respect that can be imagined, the most completely contrary to the faith of treaties: he who makes use of it, either impudently sports with that sacred faith, or sufficiently shews, that he is not ignorant how shameful it is to want it: he would act like a dishonest man, and keep the reputation of a man of probity; he is an hypocrite who adds to his crime odious dissimulation. Grotius relates several examples of an interpretation manifestly false*: the Platææ having promised the Thebans to restore the prisoners, restored them after they had taken away their lives. Pericles having promised life to those of the enemies who laid down their iron arms, caused those to be killed whose cloaks were fastened with iron clasps. A Roman general † having agreed with Antiochus to restore half of his vessels, caused them all to be

* *De Jure Belli et Pacis, Lib. II. Cap. XVI. § c.*

† Q. Fabius Labco, as related by Valerius Maximus; Titus Livy takes no notice of this.

sawed in two : all these interpretations are as fraudulent as that of Rhadamistus, who, according to Tacitus *, having sworn to Mithridates that he should use against him neither fire nor poison, caused him to be smothered under a heap of cloathes.

A prince may tacitly engage his faith as well as in express terms : it is sufficient that it be given in order to become obligatory : the manner can make no difference : tacit faith is founded on a tacit consent, and a tacit consent is that which is deduced by a just consequence from the steps taken by any one. Thus all that is included, as Grotius says †, in the nature of certain acts on which an agreement is made is tacitly comprehended in the convention : or, in other words, every thing without which what is agreed upon cannot take place, is tacitly granted. If, for example, a promise is made to the army of an enemy that has advanced far into the country, that they shall be allowed to return home in safety, it is manifest that they cannot be refused provisions, for they cannot return without them. In the same manner, in demanding or accepting an interview, full security is tacitly promised. Titus Livy justly says, that the Gallo-Greeks violated the law of nations in attacking the consul Manlius, at the time when he repaired to the place of interview to which they had invited him ‡. The emperor Valerius having been defeated by Sapor king of Persia, sent to him to demand a peace. Sapor declared, that he would treat with the enemy in person ; and Valerius, without distrust, going to the interview, was carried off by the perfidious enemy, who kept him a prisoner till his death, and treated him with the most brutal cruelty §.

Grotius, in treating of tacit conventions, speaks of those in which persons are bound by mute signs §. We ought not to confound these two kinds. The consent sufficiently declared by a sign, is as express as if it had been signified by the voice. Words themselves are no more than instituted signs. There are mute signs, which received custom renders as clear and as express as words. Thus, at present, in hanging out a white flag, a parley is demanded, as expressly as it could be done with the voice. The security of the enemy, who advances upon this invitation, is tacitly promised.

C H A P. VIII.

Of Sureties given for the Observation of Treaties.

UNHAPPY experience having too fully convinced mankind, that the faith of treaties, so holy and sacred, is not always a sufficient warrant for their observation ; they have therefore

* *Annal. Lib. XII.*

† *Lib. III. Cap. XXVI. § 1.*

‡ Titus Livy, *Lib. XXXVIII. Cap. XXV.*

§ The Life of Valerian, in Crevier's History of the Emperors.

§ *Lib. III. Cap. XXIV. § 5.*

sought

fought for securities against perfidy, for methods, the efficacy of which did not depend on the good faith of the contracting powers. A *guaranty* is one of these means. When those who have made a treaty of peace, or any other treaty, are not perfectly easy with respect to its observation, they seek for the guaranty of a powerful sovereign. The *guarantee* promises to maintain the conditions of the treaty, and to cause it to be observed. As he may find himself obliged to make use of force against the contracting power who violates his promises, it is an engagement that no sovereign ought to enter into lightly, and without good reason. Princes indeed seldom enter into it, but when they have an indirect interest in the observation of the treaty; or from particular connections of friendship. The guaranty may be promised equally to all the contracting parties, to some of them, or even to one alone; but it is commonly promised to all in general. It may also happen, that several sovereigns, entering into a common alliance, reciprocally render themselves the guarantees of its observation, with respect to each other. The guaranty is a kind of treaty, by which assistance and succours are promised to any one, in case he has need of them, in order to oblige another who is unfaithful to fulfil his engagements.

§ 236.
Guarantees have no right to interfere unasked in the execution of a treaty.

Guaranty being given in favour of the contracting powers, or of one of them, it does not authorise the guarantee to interfere in the execution of the treaty, or to press the observance of it, of himself, and without being required. If the parties, by common agreement, judge proper to deviate from the tenor of the treaty, to alter some of the articles, or to annul them entirely; if one would gladly have something altered in favour of another, they have a right to do it, and the guarantee cannot oppose it. Obligated by his promise to maintain it, so far that none shall complain of its infraction, he has acquired no rights for himself. The treaty was not made for him; for if it was, he would not be merely a guarantee, but also a contracting party. This observation is of great importance; for care should be taken, lest under the pretence of being a guarantee, a powerful sovereign should make himself the arbiter of the affairs of his neighbours, and pretend to give them laws.

But it is true, that if the parties produce any change in the articles of the treaty, without the advice and concurrence of the guarantee, this last is no longer bound to adhere to the guaranty; for the treaty thus changed, is no longer that which he guaranteed.

§ 237.
The nature of the obligation is impossible.

A nation not being obliged to do that for another which that other can do for itself, the guarantee is not naturally obliged to send succours, except in the case where that nation, to whom he has granted his guaranty, is not in a condition to procure justice for itself.

If there arises any dispute between the contracting powers about the sense of any article of the treaty, the guarantee is not suddenly obliged to assist him in favour of whom he has given his

gua-

guaranty. As he cannot engage to support injustice, he is to examine, and to search for the true sense of the treaty, to weigh the pretensions of him who reclaims his guaranty; and if he finds them ill founded, he may refuse to support them without failing in his engagements.

It is not less evident, that the guaranty cannot be injurious to the rights of a third person. If it happens then that the treaty guarantied is found to be contrary to the right of another person, this treaty being unjust on this point, the guarantee is no ways bound to procure the accomplishment of it; for, he can never, as we have shewn, be obliged to support injustice. This was the reason alledged by France, when she declared for the house of Bavaria against the heirs of Charles VI. though she had guarantied the famous *pragmatic sanction* of that emperor. This reason is incontestably a good one, in the general view of it: it is necessary only to see whether the court of France made a just application of it. *Non nostrum inter vos tantas componere lites.*

§ 238.
The guaranty cannot be injurious to a third person.

I shall observe on this occasion, that according to common usage, the term *guaranty* is often taken in a sense a little different from that we have given to this word. Most of the powers of Europe guarantied the act by which Charles VI. had regulated the succession to his dominions; the sovereigns sometimes reciprocally guaranty their respective states: we rather call these treaties of alliance to maintain that law of the succession, in order to support the possession of those states.

The guaranty naturally subsists as long as the treaty that is made the object of it; and in case of doubt, this ought always to be presumed, since it is sought for, and given for the security of the treaty. But nothing can prevent its being confined to a certain time, to the lives of the contracting powers, to that of the guarantee, &c. In a word, we may apply a treaty of guaranty to all we have said of treaties in general.

§ 239.
Duration of the guaranty.

When it relates to things which another may do or give, as well as he who promises; as for instance, paying a sum of money; it is safer to demand a *security* than a *guaranty*: for the *security* ought to accomplish the promise in default of the principal party, while the guarantee is only obliged to do what depends on him, to render the promise fulfilled by him who made it.

§ 240.
Of treaties of security.

A nation may put some of its possessions into the hands of another, for the security of its promises, debts, or engagements. If it thus remits moveable things, it gives *pledges*. Poland has formerly pledged a crown and other jewels to the sovereigns of Prussia. But towns and provinces are sometimes given in pawn. If they are pledged only by an act which assigns them for the security of a debt, they serve as a *mortgage*: if they are put into the hands of a creditor, or of him with whom a prince has treated, they have the title of engagements or securities; and if the revenues are ceded as an equivalent for the interest of the debt, it is the pact called *antichefisis*.

§ 241.
Of pawns, securities, and mortgages.

§ 242.
Of the
rights of a
nation in
what re-
lates to a
pledge.

All the right of him who holds a crown or province in pledge, is to secure what is due to him, or the promise that has been made him. He may then keep the town or the province in his hands till he is satisfied; but he has not a right to make any change in it; for that town, or that country, does not belong to him as proprietor. He cannot even interfere in the government of it, beyond what is required for his security, unless the empire, or the exercise of sovereignty, has been expressly made over to him. This last point is not naturally to be presumed, since it is sufficient for the security of the mortgage, that the country is put into his hands, and under his power. He is also obliged, like every other person who has received a pledge, to preserve the country he holds for his security, and to prevent, as much as possible, its being laid waste: he is answerable for this; and if the country happens to be ruined through his fault, he ought to indemnify the state which committed it to his care. If the sovereignty is committed to him, with the country itself, he ought to govern it according to its constitution, and precisely in the same manner as the sovereign of the country was obliged to govern it; for the latter could only pledge his lawful right.

§ 243.
How he is
obliged to
restore it.

As soon as the debt is paid, or the treaty is accomplished, the security ends; and he who holds a town or a province by this title ought to restore it faithfully, in the same state in which he received it, so far as this depends on him.

Among those who have no law but their avarice or their ambition, who, like Achilles, place all their right in the point of their sword*; the temptation is delicious: they have recourse to a thousand quibbles, a thousand pretences, to retain an important place, or a country under their obedience. The subject is too odious for us to alledge examples: they are well enough known, and sufficiently numerous, to convince every sensible nation, that it is very imprudent to make over such securities.

§ 244.
How it may
be appro-
priated.

But if the debt be not paid at the fixed time, or if the treaty be not accomplished, that which has been given in security may be detained and appropriated, or the mortgage seized, at least, till the discharge of the debt, or a just recompence be made. The house of Savoy had mortgaged the country of Vaud to the two cantons of Bern and Fribourg. As it did not pay the mortgage, these two cantons took arms to make themselves masters of the country. The duke of Savoy, instead of speedily satisfying the debt, opposed them by force of arms, and gave them other subjects of complaint: the victorious cantons have therefore retained this fine country, as well for the payment of the debt, as to defray the expences of the war, and to obtain a just indemnification.

§ 245.
Of hosta-
ges.

In fine, a precaution of security, which is very ancient, and much used among nations, is requiring hostages. These are considerable persons, whom the promising party delivers up to him

* Jura negat sibi nata, nil non arrogat armis. Horat.

to whom he binds himself, in order to keep them till the accomplishment of what he has promised. This then is a contract relating to a pledge, in which free men are delivered up, instead of towns, countries, or jewels. We may therefore confine ourselves, with respect to this contract, to making those particular observations, which the difference of the things pledged renders necessary.

The sovereign who receives the hostages, has no other right over them, than that of making sure of their persons, in order to detain them till the entire accomplishment of the promises of which they are the pledge. He may therefore take precaution to avoid their escaping from him; but these precautions should be moderated by humanity, towards men whom he has no right to use ill, and they ought not to be extended beyond what prudence requires.

§ 246.
What right
a sovereign
has over
hostages.

It is at present an amiable right, to behold the European nations content themselves with the parole of the hostages. The English lords sent to France in that quality, in pursuance of the treaty of Aix-la-Chapelle, in 1748, to stay till the restitution of Cape Breton, were solely bound by their word of honour, and lived at court, and at Paris, rather as ministers of their nation, than as hostages.

The liberty alone of hostages is engaged, and if he who has given them breaks his promise, they may be kept in captivity. Formerly they were in such cases put to death: an inhuman cruelty, founded on an error. It was believed that the sovereign might arbitrarily dispose of the lives of his subjects, or that every man was the master of his own life, and had a right to stake it as a pledge, when he delivered himself up as an hostage.

§ 247.
The liberty
alone of
hostages is
given as a
pledge.

As soon as the engagements are fulfilled, the cause for which hostages were delivered no longer subsists; they are free, and ought to be restored without delay. They ought also to be restored, if the reason for which they were demanded does not take place: to detain them then would be to abate the sacred faith upon which they were delivered. The perfidious Christiern II. king of Denmark, being obliged by contrary winds to stop before Stockholm, and being, with his whole fleet, ready to perish with hunger, made proposals of peace: Steno, the administrator, imprudently trusting to his promises, furnished the Danes with provisions, and even gave Gustavus, and other lords, as hostages for the safety of the king, who pretended to have a desire to come on shore: but the first fair wind, Christiern weighed anchor, and carried off the hostages; thus returning the generosity of his enemy, by an infamous treachery*.

§ 248.
When they
ought to be
sent back.

Hostages being delivered on the faith of treaties, and he who receives them, promising to restore them, as soon as the promise, of which they are the surety, shall be fulfilled, such engagements ought to be literally accomplished: for it is necessary that the

§ 249.
Whether
they may be
detained on
any other
account.

* History of the Revolutions of Sweden.

hostages should be really and faithfully restored to their first state, as soon as the accomplishment of the promise has disengaged them. It is not therefore permitted to detain them for any other cause. I am surprised to see that able men * teach the contrary. They build upon a sovereign's right of seizing and detaining the subjects of another power, in order to oblige him to do justice. The principle is true; but the application is not just. These authors do not pay attention to this consideration, that a hostage is put into the hands of that sovereign, not without the faith of a treaty, in virtue of which he has been delivered, and is not exposed to be so easily seized; and that the faith of such a treaty does not suffer, that any other use should be made of him who is appointed, nor that an advantage should be taken beyond what has been expressly agreed. The hostage is delivered for the security of a promise, and for that only: as soon as the promise is fulfilled, the hostage, as we have just observed, ought to be restored to his first state. To tell him they release him as an hostage, but that they detain him as a pledge for the security of any other pretension, would be to take advantage of his state of an hostage, contrary to the manifest spirit, and even in opposition to the very letter of the convention; according to which, as soon as the promise is accomplished, the hostage ought to be restored to himself and his country, and replaced in the state from whence he was taken, as if he had never been an hostage. If sovereigns did not strictly adhere to this principle, there would be no longer any security in giving of hostages; it would be easy for princes always to find some pretence for detaining them. Albert the Wise, duke of Austria, making war in the year 1351, against the city of Zurich, the two parties referred the decision of their disputes to arbitrators, and Zurich gave hostages. The arbitrators passed an unjust sentence, dictated by partiality. In the mean time Zurich, after having made just complaints, relolved to submit to this decision: but the duke formed new pretensions, and detained the hostages †, contrary to the faith of the arbitration, and in evident contempt of the law of nations.

§ 250.
They may,
for their
own ac-
tions.

But an hostage may be detained for his own actions, for crimes committed, or debts contracted in the country while he is an hostage there. This is doing no injury to the faith of the treaty. In order to be sure of recovering his liberty, according to the terms of the treaty, the hostage ought not to have the right of committing, with impunity, an outrage against the nation in which he is kept; and when he should depart, it is just that he should pay his debts.

§ 251.
Of the sup-
port of the
hostages.

He who gives the hostages is to provide for their support; for they are there by his order, and for his service. He who receives them for his own security, ought not to be at the expence of their

* *Crotius, Lib. III. Cap. XX. § 55. Wolfius Jus Gent. § 503.*

† Tichaudi, Vol. I. pag. 241.

subsistence, but only of that of their guard, if he thinks proper to set a guard over them.

The sovereign may dispose of his subjects for the service of the state; he may therefore also give them in hostage; and he who is nominated ought to obey, as on every other occasion, where he is commanded, for the service of the country. But as the expences ought to be borne equally by the citizens, those of the hostage ought to be defrayed at the public expence.

§ 252.
A subject
can not re-
fuse being
an hostage.

The subject alone may be given for an hostage in spite of himself. The vassal is not in this situation; for what he owes to the sovereign, is determined by the conditions of the fief: and he is bound to nothing more. Thus it is decided, that the vassal cannot be constrained to go as an hostage, if he is not at the same time a subject.

Whoever can make a treaty or a convention may give or receive hostages. For this reason, not only the sovereign has a right of giving them, but also inferior powers, in the agreements they make, according to the power of their posts, and the extent of their commissions. The governor of a town, and the general who lays siege to it, give and receive hostages for the security of the capitulation: whoever is under the command, ought to obey, if he is nominated.

Hostages ought naturally to be considerable persons, since they are required as a security. Mean persons form but a weak assurance, at least, if they are not in great numbers. Care is commonly taken to settle the quality of the hostages that are to be delivered, and it is a sign of bad faith to violate conventions in this respect. It was a shameful piece of perfidy in La Trimouille to give the Swiss only four hostages from the dregs of the people, instead of four of the principal citizens of Dijon, as it was agreed in the famous treaty we have mentioned above (§ 212.) Sovereigns sometimes give the principal persons of the state, and princes themselves in hostage. Francis I. gave his own sons for the security of the treaty of Madrid.

§ 253.
Of the qua-
lity of ho-
stages.

The sovereign who gives hostages ought to give them with fidelity, as the pledges of his word, and consequently, with the intention that they should be kept till the entire accomplishment of his promise. He cannot then approve of their flying; and if they do, so far from receiving them, he ought to send them back. The hostage on his side, answerably to the presumed intention of his sovereign, ought to remain faithfully with him to whom he is delivered, without endeavouring to escape. Clelia escaped out of the hands of Porfenna, to whom she had been delivered as an hostage: but the Romans sent her back, that they might not break the treaty*.

§ 254.
They ought
not to fly.

If the hostage happens to die, he who has given him is not obliged to replace him, at least, if this was not mentioned in the agreement. This was the security required of him: they lost

§ 255.
Whether
the hostage
who dies
ought to be
replaced.

* Et Romani pignus pacis ex fodere restituerunt. Tit. Liv. Lib. II. Cap. XIII.

him

him without his being in fault, and no reason obliges him to give another.

§ 256.
Of him who
takes the
place of an
hostage.

If any one puts himself for some time in the place of an hostage, and this last happens to die a natural death, he who has taken the place of the hostage is free. For things ought to be put in the same state they would have been in, if the hostage had not been permitted to absent himself, and put another in his room: and for the same reason, the hostage is not free by the death of him who has taken his place only for a time. It would be quite the contrary, if the hostage had been exchanged for another: the first would be absolutely free from all engagement, and he who had taken his place would alone be bound.

§ 257.
Of an ho-
stage that
obtains the
crown.

A prince given in hostage, arriving at the crown, ought to be delivered up, on furnishing another good hostage, or so many as might altogether form an equivalent security for that furnished by himself, when he was delivered. This is manifest from the treaty itself, which does not declare that the king shall be an hostage. The king's person being in the hands of a foreign power, is a thing of too great consequence for it to be presumed, that the state had resolved to expose him to it. Fidelity ought to preside in all conventions, and should follow the manifest, or justly presumed intention of the contracting powers. If Francis I had died after having given his son as an hostage, certainly the dauphin would have been released: for he had been delivered only with a view of restoring the king to his kingdom; and if the emperor had detained him, this view would have been frustrated, the king of France would still have been a captive. I suppose, as is easily seen, that the treaty was not violated by the state that gave the princes in hostage. In case that state had broken its promise, advantage might reasonably have been taken of such an event, that rendered the hostage still more precious, and his deliverance more necessary.

§ 258.
The en-
gagement
of the ho-
stage ends
with the
treaty.

The pledge of an hostage, as that of a city, or a country, ends with the treaty it was made to secure (§ 245.) And consequently, if the treaty is personal, the hostage is free at the moment when one of the contracting powers happens to die.

§ 259.
The viola-
tion of the
treaty does
an injury to
the ho-
stages.

The sovereign who breaks his word, after his having given hostages, does an injury not only to the other contracting power, but also to the hostages themselves. For though subjects are fully obliged to obey their sovereign who gives them in hostage, that sovereign has not a right unjustly to sacrifice their liberty, and without good reason to put their lives in danger. Delivered up as an assurance of their sovereign's veracity, and not to suffer any harm; if he precipitates them into misfortunes, by violating his faith, he covers himself with double infamy. Pledges and engagements serve for a security for what is due; and their acquisition recompenses him for a breach of promise in the other. Hostages are rather pledges of the faith of him who gives them; it is supposed that he would be filled with horror at the thought of sacrificing the innocent. But if particular conjunctures oblige

a so-

a sovereign to abandon the hostages; if, for example, he who has received them is the first who violates his engagement, the treaty can no longer be accomplished, without putting the state in danger; nothing ought to be neglected to deliver these unfortunate hostages, and the state cannot refuse to recompence them for their sufferings, and to reward them, either in their own persons, or in their nearest relations.

At the moment when the sovereign, who has given the hostage, has violated his faith, the hostage loses that quality, and becomes the prisoner of him who has received him. He has a right to detain him in perpetual captivity. But it is the business of a generous prince to improve his rights, so as to assuage the misfortunes of the innocent. And as the hostage is considered as nothing by his own sovereign, who has abandoned him by his perfidy, he may devote himself to the prince who is the master of his destiny; who might acquire an useful subject, instead of a miserable prisoner, the troublesome object of his commiseration. Or he might set him free, on settling with him the conditions.

We have already observed, that the life of an hostage cannot be lawfully taken away on account of the perfidy of his master who has delivered him. The custom of nations, the most constant practice, cannot justify an instance of barbarous cruelty, contrary to the law of nature. At a time even when this frightful custom was but too much authorised, the great Scipio loudly declared, that he would not suffer his vengeance to fall on innocent hostages; but on the perfidious themselves, and that he knew how to punish none but enemies in arms*. The emperor Julian made the same declaration†. All that such a custom can produce, is impunity among the nations who practise it. Whoever is guilty of it cannot complain that another is so too: but every nation may, and ought to declare, that it considers the action as a barbarity injurious to human nature.

§ 265.
The fate of the hostage when he who has given him falls in his engagements.

§ 267.
Of the right founded on custom.

C H A P. XVII.

Of the Interpretation of Treaties.

IF the ideas of men were always distinct, and perfectly determined, if in order to make them known, they had only proper terms, and none but such expressions as were clear, precise, and susceptible only of one sense, there would never be any difficulty in discovering their meaning in the words by which they would express it: nothing more would be necessary, than to understand the language. But yet the art of interpretation would not be useless. In concessions, conventions, and treaties, in all con-

§ 268.
That it is necessary to establish rules of interpretation.

* Tit. Liv. Lib. XXVIII. Cap. XXXIV.
§ 18. nel. 2.

† See Grotius, Lib. III. Cap. XI.

tracts as well as in the laws, it is impossible to foresee and point out all the particular cases, that may arise: we appoint, we ordain, we agree upon certain things, and express them in a general view; and though the expressions of a treaty should be perfectly clear, plain, and determinate, the true interpretation would still consist, in making, in all the particular cases that present themselves, a just application of what has been decreed in a general manner. But this is not all, conjunctures vary, and produce new kinds of cases, that cannot be brought within the terms of the treaty, or the law; but by inductions drawn from the general views of the contracting powers, or of the legislature. Contradictions, and inconsistencies, either real or apparent, present themselves with respect to different articles; and the question is, to reconcile them, and to shew the part that ought to be taken. But it is much worse if we consider that fraud seeks to take advantage even of the imperfection of language; that men designedly throw obscurity and ambiguity into their treaties, to obtain a pretence of eluding them upon occasion. It is then necessary to establish rules founded on reason, and authorised by the law of nature, capable of diffusing light over what is obscure, of determining what is uncertain, and of frustrating the attempts of a contracting power void of good faith. Let us begin with those that tend particularly to this last end; with those maxims of justice and equity destined to repress fraud, and prevent the effect of its artifices.

§ 263.

1. General maxim: it is not allowable to interpret what has no need of interpretation.

The first general maxim of interpretation is, that it is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents. To go elsewhere in search of conjectures in order to restrain or extinguish it, is to endeavour to elude it. If this dangerous method be once admitted, there will be no act which it will not render useless. Let the brightest light shine on all the parts of the piece, let it be expressed in terms the most clear and determinate; all this shall be of no use, if it be allowed to search for foreign reasons in order to maintain what cannot be found in the sense it naturally presents.

§ 264.

2. General maxim: if he who can and ought to explain himself has not done it, it is to his own damage.

The cavillers, who dispute the sense of a clear and determinate article, are accustomed to draw their vain subtleties from the pretended intention and views of the author of that article. It would be very often dangerous to enter with them into the discussion of these supposed views, that are not pointed out in the piece itself. This is a rule more proper to repel them, and which cut off all chicanery: *If he who can, and ought to have explained himself clearly and plainly, has not done it, it is worse for him: he cannot be allowed to introduce subsequent restrictions, which he has not expressed.* This is a maxim of the Roman law: *Pactionem obscuram iis nocere, in quorum fuit potestate legem apertius*

tius conscribere *. The equity of this rule is extremely visible, and its necessity is not less evident. There can be no secure conventions, no firm and solid concession, if these may be rendered vain by subsequent limitations that ought to have been mentioned in the piece, if they were included in the intentions of the contracting powers.

The third general maxim, or principle, on the subject of interpretation is: *that neither the one nor the other of the interested, or contracting powers, has a right to interpret the act, or treaty, at his pleasure.* For if you are at liberty to give my promise whatsoever sense you please, you will have the power of obliging me to do whatever you have a mind, contrary to my intention, and beyond my real engagement: and reciprocally, if I am allowed to explain my promises as I please, I may render them vain and illusive, by giving them a sense quite different from that in which they were presented to you, and in which you must have taken them in accepting them.

On every occasion when a person has, and ought to have shewn his intention, we take for true against him, what he has sufficiently declared. This is an incontestible principle applied to treaties; for if they are not a vain play of words, the contracting parties ought to express themselves in them with truth, and according to their real intentions. If the intention sufficiently declared, was not taken for the true intention of him who speaks and binds himself, it would be of no use to contract, and form treaties.

But it is here asked, which of the contracting powers ought to have his expressions considered as most decisive, with respect to the true sense of the contract; whether we should stop at those of the power promising, rather than at those of him who stipulates? The force and obligation of every contract, arising from a perfect promise, and he who promises being no farther engaged than his will is sufficiently declared; it is very certain, that in order to know the true sense of the contract, attention ought principally to be paid to the words of him who promises. For he voluntarily binds himself by his words, and we take for true against him, what he has sufficiently declared. What appears to have given room to this question is, the manner in which conventions are sometimes made: the one offers the conditions, and the other accepts them: that is, the first proposes what he requires, that the other shall oblige himself to perform; and the second declares the obligations into which he really enters. If the words of him who accepts the conditions, relate to the words of him who offers them, it is certainly true, that we ought to regulate ourselves according to the expressions of the latter; but this is because the person promising, is considered as repeating them, in

* *Digest. Lib. II. Tit. XIV. de Pactis Leg. 39.* See likewise *Digest. Lib. XVIII. Tit. I. de contrahenda emptione, Leg. 21.* Labeo scripsit obscuritatem pacti nocere potius debere venditori, qui id dixerit, quam emptori; quia potuit re integra apertius dicere.

order to form his promise. The capitulations of places besieged may here serve us for an example. The besieged proposes the conditions on which he is willing to surrender the place. The besieger accepts them: the expressions of the first lay no obligation on the last, if it be not understood that he adopts them. He who accepts the conditions, is the true promiser; and it is in his words that he ought to seek for the true sense of the articles, whether he chuses and forms them himself, or whether he adopts the expressions of the other party, by making use of them in his promise. But it is always to be remembered, that only that must be taken for true against him which he has sufficiently declared. I am going to explain myself more particularly on this subject.

§ 268.
5. General
maxim:
the inter-
pretation
ought to be
made ac-
cording to
certain
rules.

It is a question in the interpretation of a treaty, or of any other act whatsoever, to know what the contracting powers have agreed upon, in order to determine precisely, on any particular occasion, what has been promised and accepted; that is to say, not only what one of the parties has had the intention to promise; but also what the other has reasonably and sincerely thought to be promised; what has been sufficiently declared to him, and upon which he must have regulated his acceptance. *The interpretation of every act, and of every treaty ought then to be made according to certain rules proper to determine the sense of them, such as the parties concerned must naturally have understood, when the act was prepared and accepted.* This is the fifth principle.

As these rules are founded on right reason, and are consequently approved and prescribed by the law of nature, every man, every sovereign, is obliged to admit and to follow them. If princes were to acknowledge no rules that determined the sense in which the expressions ought to be taken, treaties would be only empty words; nothing could be agreed upon with security, and it would be almost ridiculous to place any dependence on the effect of conventions.

§ 269.
The faith
of treaties
lays an obli-
gation to
follow these
rules.

But sovereigns acknowledging no common judge, no superior that can oblige them to receive an interpretation founded on just rules; the faith of treaties here forms all the security of the contracting powers. This faith is not less wounded by a refusal to admit an evidently right interpretation, than by an open infraction. It is the same injustice, the same infidelity; and for one of them to involve himself in the subtilties of fraud, is not less odious.

§ 270.
General
rule of in-
terpre-
tation.

Let us now enter into the particular rules on which the interpretation ought to be formed, in order to be just and right. Since the lawful interpretation of a contract ought to tend only to the discovery of the thoughts of the author, or authors of that contract, as soon as we meet with any obscurity we should seek for what was probably in the thoughts of those who drew it up, and to interpret it accordingly. This is the general rule of all interpretations. It particularly serves to fix the sense of certain expressions, the signification of which is not sufficiently determined. In virtue of this rule, we should take these expressions in the most extensive sense, when it is probable, that he who speaks, has

has had in his view every thing pointed out in this extensive sense; and on the contrary, we ought to confine the signification, if it appears that the author has bounded his thoughts by what is comprehended in the more limited sense. Let us suppose that a husband leaves his wife all his money. It is required to know, if this expression means only his ready money, or whether it extends also to that which is placed out, and is due on bonds and other securities. If the wife is poor, if she was dear to her husband, if there was found but little ready money, and the value of the other goods greatly surpassed that of the money, both in specie and in paper, the husband, to all appearance, intended that she should possess all the money due to him, as well as that in his coffers. On the contrary, if the woman is rich, if there be found large sums of ready money, and if the value of what is found greatly exceeds the value of the other wealth, it appears that the husband intended to leave his wife only his ready money.

We ought also, in consequence of the same rule, to give to a disposition, the full extent properly implied in the terms, if it appears that the author has had in his view every thing properly comprehended in them; but the signification ought to be restrained, when it is probable, that he who has made the disposition has not extended them to every thing which the propriety of the terms might include. As for instance, a father who has an only son, leaves the daughter of his friend all his jewels: he has a sword enriched with diamonds, given him by a sovereign prince; and there is certainly no appearance, that the testator ever thought of making this mark of honour pass into a foreign family. This sword, with the jewels with which it is adorned, ought then to be excepted from the legacy, and the signification of the terms to be restrained to his other jewels. But if the testator has neither son nor heir of his own name, and leaves his fortune to a stranger, there is no reason to limit the signification of the terms; they should be taken in their full sense, it being probable, that the testator has employed them in the same sense.

The contracting powers are obliged to express themselves in such a manner, as they may mutually understand each other. This is manifest from the nature even of the act. Those who contracted, concurred in the same will, they agreed to desire the same thing, and how they could agree upon it if they did not understand it perfectly? If this was not the case, their contract could be nothing but either sport, or a snare. If then they ought to speak in such a manner as to be understood, it is necessary that they should employ the words in their proper signification, in the sense which custom has given them, and that they should affix to the terms they use, and to all their expressions, the received signification. They are not permitted to deviate with design, and without mentioning it, from the common use, and propriety of the expression: and it is presumed that they have conformed to it, while there are no pressing reasons to presume the contrary;

§ 271.
We ought
to explain
the terms
conforma-
bly to
common
custom.

for the presumption is in general, that things have been done as they ought. From all these incontestible truths, result this rule: *In the interpretation of treaties, pacts, and promises, we ought not to deviate from the common use of the language, at least, if we have not very strong reasons for it.* In all human affairs, where there is a want of certainty, we ought to follow probability. It is commonly very probable that they have spoken according to custom; this always forms a very strong presumption, which cannot be surmounted but by a contrary presumption, that is still stronger. Camden * gives us a treaty in which it is expressly said, that the treaty shall be precisely understood, according to the force and meaning of the terms. After such a clause, we cannot, under any pretence, deviate from the proper sense custom has affixed to the terms; the will of the contracting powers being there plain, and declared in the most determinate manner.

§ 272.
Of the interpretation
of ancient
treaties.

The custom of which we are speaking is, that of the time in which the treaty, or the act in general, was concluded and drawn up. Languages vary incessantly, and the signification and force of words change with time. When an ancient act is to be interpreted, we should then know the common use of the terms, at the time when it was written: and this is known by carefully comparing with each other, an act of the same date, and cotemporary writers. This is the only source by which we can truly arrive at this knowledge. The use of the vulgar languages being, as every one knows, very arbitrary, researches into the etymological and grammatical meaning of terms, in order to discover the true sense, according to common custom, would form only a vain theory, equally useless and destitute of proof.

§ 273.
Of quibbles
on words.

Words are only designed to express the thoughts; thus the true signification of an expression in common use, is the idea which custom has affixed to that expression. It is then a gross quibble to affix a particular sense to a word, in order to elude the true sense of the intire expression. Mahomet, Emperor of the Turks, at the taking of Negropont, having promised a man to spare his head, caused him to be cut in two through the middle of the body. Tamerlain, after having engaged the city of Sabasta to capitulate under the promise of causing no blood to be spilt, caused all the soldiers of the garrison to be buried alive †: gross subtrefuges which, as Cicero ‡ remarks, only serve to aggravate the crime of perfidy! *To spare the head of any one, and to spill no blood*, are expressions, according to common custom, and especially on such an occasion, which manifestly imply *giving life and safety*.

§ 274.
A rule on
this subject.

All these miserable subtilties are overthrown by this unerring rule: when we manifestly see what is the sense that agrees with

* Hist. of Queen Elizabeth.

† See Puffendorf's *Laws of Nature and Nations*, Book V. Cap. XII. § 3. La Croix, in his *Hist. of Timur-bee*, Book V. Ch. XV. speaks of Timur-bee's, or Tamerlain's cruelty towards 4000 Armenian knights; but says nothing of the perfidy which others attribute to him.

‡ *Fraus enim adstringit, non dissolvit perjurium. De Offic. Lib. III. Cap. XXXII.*
the

the intention of the contracting powers, it is not permitted to turn their words to a contrary meaning. The intention sufficiently known, furnishes the true matter of the convention, of what is promised, and accepted, demanded, and granted. To violate the treaty is to go contrary to the intention sufficiently manifested, rather than against the terms in which it is conceived; for the terms are nothing without the intention that ought to dictate them.

Is it necessary, in an enlightened age, to say that mental reservations cannot be admitted in treaties? This is manifest, since by nature even of the treaty, the parties ought to declare the manner in which they would be reciprocally understood (§ 271). There is scarcely a person at present who would not be ashamed of building upon a mental reservation. What can be the use of such an artifice, if it was not to lull to sleep some other person under the vain appearance of a contract? It is then a real piece of knavery.

§ 275.

Of mental reservations.

Technical terms, or terms proper to the arts and sciences, ought commonly to be interpreted according to the definition given of them by the masters of the art, the person versed in the knowledge of the art or science to which the term belongs. I say commonly; for this rule is not so absolute, that we cannot, or even ought not to deviate from it, when we have good reasons to do it; as for instance, if it was proved, that he who speaks in a treaty, or in any other public piece, did not understand the art or science from which he borrowed the term, that he knew not its force as a technical word; that he has employed it in a vulgar sense, &c.

§ 276.

Of the interpretation of technical terms.

If terms of art, or others always relate to things that admit of different degrees, we ought not scrupulously to attach ourselves to definitions; but rather to take the terms in a sense agreeable to the discourse of which they are a part. For a thing is regularly defined in its most perfect state, and yet it is certain that we do not always understand it in that most perfect state, whenever we speak of it. Now the interpretation should only tend to the discovery of the will of the contracting power (§ 268.); we should then attribute to each term, the sense which he who speaks had probably in his mind. Thus when it is agreed in a treaty, to submit to the decision of two or three able civilians, it would be ridiculous to endeavour to elude the compromise, under the pretence that we could find no civilian accomplished in every point, or to strain the terms so far as to reject all who did not equal Cujas, or Grotius. Would he who had stipulated for the assistance of ten thousand good troops, have any reason to pretend, that the least of these soldiers should be comparable to the veterans of Julius Caesar? And if a prince had promised his ally a good general, must he send him none but a Marlborough or a Turenne?

§ 277.

Of terms whose signification admit of degrees.

There are figurative expressions that are become so familiar in the common use of language, that they take place on a thousand

§ 278.

Of figurative expressions.

occasions of the proper terms, so that we ought to take them in a figurative sense, without paying any attention to their original, proper, and more direct signification: the subject of the discourse sufficiently indicates the sense that should be given them. *To hatch a plot, to carry fire and sword into a country* *, are expressions of this sort: there is scarcely any occasion where it would not be absurd to take them in their direct and literal sense.

§ 279.
Of equivocal expressions.

There is not perhaps any language that has not also words which signify two or many different things, or phrases, susceptible of more than one sense. Thence arises mistakes in discourse. The contracting powers ought carefully to avoid them. To employ them with design in order to elude engagements, is a real perfidy, since the faith of treaties obliges the contracting parties to express their intentions clearly (§ 271). But if the equivocal term has found admission into a public treaty, the interpretation is to make the uncertainty produced by it disappear.

§ 280.
The rule for these two cases.

This is the rule that ought to direct the interpretation in this, as well as in the preceding case: *We ought always to give to expressions the sense most suitable to the subject, or to the matter to which they relate.* For we endeavour by a true interpretation, to discover the thoughts of those who speak, or of the contracting powers in a treaty. Now it ought to be presumed, that he who has employed a word capable of many different significations, has taken it in that which agrees with the subject. In proportion as he employs himself on the matter in question, the terms proper to express his thoughts present themselves to his mind; this equivocal word could then only offer itself in the sense proper to express the thought of him who makes use of it, that is, in the sense agreeable to the subject. It would be to no purpose to object, that we have sometimes recourse to equivocal expressions, with a view of exhibiting something very different from what one has truly in the mind, and that then the sense which agrees with the subject is not that which answers to the intention of the man who speaks. We have already observed, that whenever a man can, and ought to have made known his intention, we may take for true against him what he has sufficiently declared (§ 266). And as good faith ought to preside in conventions, they are always interpreted on the supposition that it actually did preside in them. Let us illustrate this rule by examples: the word *day*, is understood of the *natural day*, or of the time during which the sun affords us its light, and the *civil day*, or of the space of twenty-four hours. When it is used in a convention to point out a space of time, the subject itself manifestly shews, that we meant the civil day, or the term of twenty-four hours. It was a miserable artifice, or rather a notorious perfidy in Cleomenes, when having concluded a truce of some days with the people of Argos, and finding them asleep on the third night, relying on the faith of the treaty, he killed a part, and made the rest prisoners, al-

* Ourdir une trame, porter le fer & le feu dans un païs.

ledging, that the nights were not comprehended in the truce †. The French word *ser* may be understood, either of iron, or of the weapons made of it, as the sword. Therefore in a convention wherein it is declared, that *the enemy shall lay down their ser or their swords*, it evidently signifies their arms: therefore Pericles, in the example related above (§ 233.), gave a fraudulent interpretation of his words, since it was contrary to what the nature of the subject manifestly pointed out. Q. Fabius Labeo was not a less dishonest interpreter of his treaty with Antiochus; for a sovereign agreeing, that he shall have half his fleet or his vessels restored, undoubtedly means, that half the number of vessels may be restored to him that he may make use of them, and not the half of each vessel, when sawed into two. Pericles, and Fabius are also condemned by the rule established above (§ 274.), which forbids turning the sense of the words contrary to the manifest intention of the contracting powers.

If any one of those expressions that have many different significations, are found more than once in the same piece, we cannot make it a law, to take it every where in the same signification. For we must, conformably to the preceding rule, take this expression in each article according as the subject requires, *pro substrata materia*, as the masters of the art say. The word *day*, for instance, has two significations, as we have just observed (§ 280.): if therefore it be said in a convention, that there shall be a truce of fifty days, on condition that the commissaries on both sides shall jointly endeavour, during eight days following each other, to adjust the dispute: the fifty days of the truce are civil days of twenty-four hours; but it would be absurd to understand them in the same sense in the second article, and to pretend that the commissaries should labour eight days and nights without intermission.

Every interpretation that leads to an absurdity, ought to be rejected; or in other words, we should not give to any piece a sense from which follows any thing absurd; but to interpret it in such a manner as to avoid absurdity. As it cannot be presumed, that any one desires what is absurd, it cannot be supposed, that he who speaks has intended that his words should be understood in a manner from which an absurdity follows. Neither is it allowable to presume, that he sports with a serious act; for what is shameful and unlawful is not to be presumed. We call absurd not only what is physically impossible; but what is morally so, that is, what is so contrary to reason, that it cannot be attributed to a man in his right senses. Those fanatic Jews who did not dare to defend themselves, when the enemy attacked them on the sabbath day, gave an absurd interpretation of the fourth commandment. Why did not they also abstain from dressing, walking, and eating? These also are works, if the term is carried to its utmost rigour. It is said, that a man in England married three wives, in order that he might not be subject to the penalty of the law, which for-

§ 281.

There is no necessity of giving a term the same sense in all the places in which it is used in a treaty.

§ 282.

We ought to reject every interpretation that leads to an absurdity.

† Puffendorf, Lib. V. Cap. XII. §. 7.

bids marrying two. This is doubtless a popular tale, made to cast a ridicule on the extreme circumspection of the English, who will not allow of departing from the letter in the application of the law. This wife and free people have too often seen, by the experience of other nations, that the laws are no longer a firm barrier, and secure defence, when once the executive power pretends to interpret them at pleasure. But they doubtless do not pretend, that on any occasion, the letter of the law should be strained to a sense that is manifestly absurd.

The rule we have just mentioned is absolutely necessary, and ought to be followed, even when there is neither obscurity or any thing equivocal in the discourse, the text of the law, or the treaty itself. For it must be observed, that the uncertainty of the sense that ought to be given to a law or a treaty, does not merely proceed from the obscurity, or any other fault in the expression; but also from the narrow limits of the human mind, which cannot foresee all cases and circumstances, nor include all the consequences of what is appointed, or promised; and, in short, from the impossibility of entering into this immense detail. We can only make laws or treaties in a general manner, and the interpretation ought to apply them to particular cases, conformably to the intention of the legislature, or of the contracting powers. Now it cannot be presumed, that in any case, they would lead to any thing absurd: when therefore, if their expressions taken in their proper and ordinary sense lead to it, it is necessary to turn them from that sense, just so far as is sufficient to avoid absurdity. Let us suppose a captain has received orders to advance in a right line with his troops to a certain post: he finds a precipice in his way: he certainly is not ordered to precipitate himself down it; he ought therefore to turn from the right line, so far as is necessary to avoid the precipice; but no further.

The application of the rule is more easy, when the expressions of the law, or of the treaty, are susceptible of two different senses: we then, without difficulty, take that from which no absurdity follows. In the same manner, when the expression is such, that we may give it a figurative sense, we ought doubtless to do it, when it is necessary to avoid falling into an absurdity.

We do not presume, that sensible persons had nothing in view in treating together, or in forming any other serious agreement. *The interpretation which renders a treaty null and without effect, cannot then be admitted.* We may consider this rule as a branch of the preceding; for it is a kind of absurdity to suppose, that the terms of the treaty should be reduced to say nothing. *It ought to be interpreted in such a manner, as that it may have its effect, and not to be found vain and illusive.* And in this we proceed, as we have just observed in the foregoing section. In both cases, as in all interpretations, it is necessary to give the words that sense which ought to be presumed most conformable to the intention of those who speak. If many different interpretations present themselves, proper to avoid the nullity or absurdity

§ 283.
And that
which ren-
ders the act
null and
without
effect.

dity of the treaty, we ought to prefer that which appears most agreeable to the intention for which it was dictated: particular circumstances, assisted in other rules of interpretation, will serve to explain this. Thucydides relates *, that the Athenians after having promised to retire from the territories of the Bœotians, remained in the country under the pretence that the lands actually occupied by their army, did not belong to the Bœotians. A ridiculous quibble, since in giving this sense to the treaty, they reduced it to nothing, or rather to a puerile play. By the territories of the Bœotians ought manifestly to have been understood, every thing comprehended in the irancient limits, without excepting what the enemy had seized during the war.

If he who has expressed himself in an obscure or equivocal manner, has spoken elsewhere more clearly on the same subject, he is the best interpreter of himself. *We ought to interpret his obscure or vague expressions, in such a manner, that they may agree with those terms that are clear and without ambiguity, which he has used elsewhere, either in the same treaty, or in some other of the like kind.* In fact, while we have no proof that a man has changed his mind, or manner of thinking, it is presumed that his thoughts have been the same on the same occasions; so that if he has any where clearly shewn his intention, with respect to any thing, we ought to give the same sense to what he has elsewhere said obscurely on the same affair. Let us suppose, for instance, that two allies have reciprocally promised each other, in case of necessity, the assistance of ten thousand foot, supported at the expence of him who sent them, and that by a posterior treaty, they agreed that the succours should be fifteen thousand, without mentioning their support: the obscurity and uncertainty which remains in this article of the new treaty, is dissipated by the clear and express stipulation of the first, the allies not shewing that they have changed their minds, with respect to the support of the auxiliary troops, it ought not to be presumed, and these fifteen thousand men should be supported as the ten thousand promised in the first treaty. The same holds good with much stronger reason, when it relates to two articles in one and the same treaty; when, for example, a prince promises to support and pay ten thousand men for the defence of the states of his ally, and in another article, only four thousand men, in case that ally is engaged in an offensive war.

Frequently, in order to abridge, people express imperfectly, and with some obscurity, what they suppose is sufficiently elucidated by the things that preceded it, or even what they propose to explain afterwards; and besides, the expressions have a force, and sometimes even an entirely different signification, according to the occasion, their connection, and their relation to other words. The connection and train of the discourse is also another source of interpretation. *We ought to consider the whole discourse together, in order perfectly to conceive the sense of it, and to give*

§ 284.

Obscure expressions interpreted by others more clear in the same author.

§ 285.

Interpretation founded on the connection of the discourse.

to each expression, not so much the signification it may receive in itself, as that it ought to have from the thread and spirit of the discourse. This is the maxim of the Roman law, *Incivile est, nisi totâ lege perspectâ unâ aliquâ particulâ ejus proposita, judicare, vel respondere* *.

§ 286.
Interpreta-
tion drawn
from the
connection
and rela-
tion of the
things
themselves.

The connection and relation of things themselves, serve also to discover, and establish the true sense of a treaty, or of any other piece. *The interpretation ought to be made in such a manner, that all the parts appear consonant to each other, that what follows, agree with what went before; at least, if it does not manifestly appear, that by the last clauses, something is changed that went before.* For it is presumed, that the authors of the treaty have had an uniform and steady train of thought; that they did not desire things which ill-agreed with each other, or contradictions; but rather that they have intended to explain one thing by another; and, in a word, that one and the same spirit reigns throughout the same work, or the same treaty. Let us render this more plain by an example. A treaty of alliance declares, that one of the allies being attacked, each of the others shall furnish succours of ten thousand foot, paid and supported; and in another article, it is said that the ally who is attacked, shall be at liberty to demand succours in cavalry, rather than in infantry. Here we see, that in the first article, the allies have determined the number of the succours, and its value, that of ten thousand foot; and, in the last article, they leave the nature of the succours, to the choice of him who shall want them, without their appearing to desire any change in their value or number. If then the ally attacked, demands cavalry, they will give him according to the known proportion, an equivalent to ten thousand foot. But if it appears, that the end of the last article was to enlarge, in certain cases, the succours promised; for example, if it be said, that one of the allies happening to be attacked by an enemy much more powerful than him, and stronger in cavalry, the succours shall be furnished in cavalry, and not in infantry: it will then appear, that in this case, it ought to be ten thousand horse.

As two articles in one and the same treaty may relate to each other, two different treaties may do so too; and in this case, they are to be explained by one another. One is promised with a view to a certain thing that there shall be delivered ten thousand sacks of wheat. Afterwards it is agreed, that instead of wheat they should give him oats. The quantity of oats is not expressed, but it is determined by comparing the second convention with the first. If nothing shews that it is intended, by the second agreement, to diminish the value of what ought to be delivered; it should be understood a quantity of oats proportioned to the price of ten thousand sacks of wheat: if it manifestly appears, by the circumstances and motives of the second convention, that the intention was to reduce the value of what was due according

* *Dig. Lib. I. Tit. III. De Legibus, Leg. 24.*

to the first, the ten thousand sacks of wheat should be changed to ten thousand sacks of oats.

The reason of the law, or the treaty, that is, the motive which led to the making of it, and the view there proposed, is one of the most certain means of establishing the true sense, and great attention ought to be paid to it, whenever it is required to explain an obscure, equivocal, and undetermined point, either of a law or of a treaty, or to make an application of them to a particular case. *As soon as we certainly know the reason which alone has determined the will of him who speaks, we ought to interpret his words, and to apply them in a manner suitable to that reason alone.* Otherwise he will be made to speak and act contrary to his intention, and in a manner opposite to his views. In virtue of this rule, a prince, who, on granting his daughter in marriage, has promised his future son-in-law succours in all his wars, owes him nothing, if the marriage does not take place.

§ 287.
Interpretation founded on the reason of the act.

But we ought to be very certain, that we know the true and only reason of the law, the promise, on the treaty. It is not here permitted to deliver ourselves up to vague and uncertain conjectures, and to suppose reason and views where there are none certainly known. If the piece in question is obscure in itself, if in order to know the sense, there are no other means left, but to search for the reason of the act, and the views of the author, we must then have recourse to conjecture, and, in want of certainty, receive for true what is most probable. But it is a dangerous abuse, to go, without necessity, in search of reasons and uncertain views, in order to turn, restrain, or destroy, the sense of a piece that is clear enough in itself, and that presents nothing absurd; this is to offend against this incontestible maxim, that it is not permitted to interpret what has no need of interpretation (§ 263). Much less is it permitted, when the author of a piece has himself there made known his reasons and motives, to attribute to him some secret reason, as the foundation to interpret the piece contrary to the natural sense of the terms. Though he had really the view attributed to him, if he has concealed it, and made known others, the interpretation can only be founded upon these, and not upon the views which the author has not expressed; we take for true against him what he has sufficiently declared (§ 266).

We ought to be so much the more circumspect in this kind of interpretation, as frequently several motives concur to determine the will of him who speaks in a law, or promise. It is possible that he was influenced only by the union of all these motives, or each taken apart might have been sufficient to determine him: in the first case, if we are very certain that the legislature, or the contracting powers, formed the law, or the contract, only in consideration of many motives, and many reasons taken together, the interpretation and application ought to be made in a manner agreeable to all these united reasons, and none of them ought to be neglected. But in the second case, when it is evident, that each

§ 288.
Of the case where many reasons concur to determine the will.

of

of the reasons that have concurred to determine the will, was sufficient to produce that effect, so that the author of the piece would for each of these reasons taken separately, have done the same, as for all together, his words ought to be interpreted and applied in such a manner as they may agree with these reasons separately taken. Suppose a prince has promised certain advantages to all the protestants and foreign artists who will come and settle in his states; if that prince is in no want of subjects, but only of artists; and if, on the other hand, it appears that he would have no other subject than protestants; his promise ought to be interpreted in a manner which relates only to the foreigners who unite these two characters of protestants and artists. But if it is evident, that this prince wants to people his country, and that though he would prefer protestant subjects to others, he has in particular so great a want of artists, that he would freely receive those of any other religion; these words should be taken in a disjunctive sense, so that it will be sufficient to be either a protestant, or an artist to enjoy the promised advantages.

§ 289.
Of what
makes a
sufficient
reason for
an act of
the will.

To avoid running out into length and embarrassment of expression, we call a *sufficient reason* an act of the will, that which has produced this act, or that which has determined the will on a particular occasion; whether the will has been determined by a single reason, or by many reasons taken together. It is then sometimes found, that this *sufficient reason* consists in the union of many different reasons, in such a manner, that where one alone of these reasons is wanting, that sufficient reason no longer exists: and in the case where we say, that many motives, many reasons, have concurred to determine the will, in such a manner, however, that each in particular would have been alone capable of producing the same effect; there would then be many *sufficient reasons* for producing one single act of the will. This is seen every day: a prince, for instance, declares war for three or four injuries received, each of which would have been sufficient to have produced the declaration of war.

§ 290.
The extensive
interpretation
taken from
the reason.
of the act.

The consideration of the reason of a law, or a promise, does not only serve to explain the obscure or equivocal terms of the piece, but also to extend or confine the dispositions independently of the terms, and to conform to the intention and views of the legislature or the contracting powers, rather than to their words. For according to the remark of Cicero*, the language invented to explain the will, ought not to hinder its effect. *When the sufficient, and only reason of a disposition, either of a law or a promise is very certain, and well known, we understand this disposition in the case where the same reason is applicable, though it is not comprehended within the signification of the terms.* This is what is called the *extensive interpretation*. It is commonly said, that we

* Quid? verbis satis hoc catum erat? Minime. Quæ res igitur valuit? Voluntas: quæ si, tacitis nobis, intelligi posset, verbis omnino non uteremur. Quia non potest, verba reperta sunt, non quæ impedirent, sed quæ indicarent voluntatem. Cicero. Orat. pro Cæsina.

ought to apply rather to the spirit than to the letter. Thus the Mahometans justly extend the prohibition of wine in the Alcoran to all intoxicating liquors; that dangerous quality being the only reason that could induce their legislator to prohibit the use of wine. Thus also, if at the time when there were no other fortifications but walls, it was agreed not to enclose a certain place with walls, it would not be allowed to defend it with fosses and ramparts; the only view of the treaty being manifestly to hinder its being made a strong place.

But we should here observe the same precaution we have lately mentioned (§ 287.), and even a still greater; since it relates to an application not authorized in any manner by the terms of the act. We ought to be very certain, that we know the true and only reason of the law or of the promise, and that the author has taken it in that extent he ought to have done, in order to comprehend the case to which we would extend that law, or that promise. As to the rest, I do not here forget what I have said above (§ 268.), that the true sense of a promise is not only what the person promising had in his mind, but also that which has been sufficiently declared, that which the two contracting powers must reasonably have understood. The true reason of a promise, is also that which the contract, the nature of things, and other circumstances, make sufficiently known: it would be useless and ridiculous to alledge some side-view, which the person had secretly in his mind.

The rule just given, also serves to destroy the pretences and miserable evasions of those who seek to elude the laws, or the treaties. Good faith affixes itself to the intention, fraud insists on the terms, when it thinks it can conceal itself under them. The isle of Pharos near Alexandria was, with other islands, tributary to the Rhodians. The latter having sent men to collect the taxes, the queen of Egypt amused them for some time at her court, making haste to join Pharos by moles to the continent; after which she laughed at the Rhodians, and ordered them to be told, that it was with a very ill grace they could pretend to raise taxes on the main land, and that they could only require them from the islands*. A law forbid the Corinthians giving vessels to the Athenians; and they sold them at five drachmas to each vessel†. The following was an expedient worthy of Tiberius; custom not permitting him to cause a virgin to be strangled, he ordered the hangman first to deflower the young daughter of Sejanus, and then to strangle her‡. To violate the spirit of the law, by pretending to respect the letter, is a fraud no less criminal than an open violation of it; it is not less contrary to the intention of the legislature, and only shews a more artful and more deliberate malice.

§ 297.
Of frauds
tending to
elude the
laws or pro-
mises.

* Puffendorf, *Lib. V. Cap. XII. § 18.* He cites Amm. Marcell. *Lib. XXII. Cap. XVI.* † Puffend. *ibid.* Herodote Erato. ‡ Tacit. *Annal. Lib. V. 9.*

The

§ 292.
Of the re-
strictive
interpreta-
tion.

*The restrictive interpretation, opposed to the extensive interpretation, is founded on the same principle. As we extend a disposition to the cases, which without being comprehended in the signification of the terms, are comprehended in the intention of that disposition, and included in the reasons that produced it: so, in like manner, we limit a law or a promise, contrary to the literal signification of the terms, by regulating our judgment, by the reason of that law or that promise: that is, if a case be presented, in which one cannot absolutely apply the well-known reason of a law or a promise, this case ought to be excepted, though, on considering the signification of the terms, it appears to fall under the disposition of the law or the promise. It is impossible to think of every thing, to foresee every thing, and to express every thing; it is sufficient to declare certain things in such a manner, as to make our thoughts known in relation to the things of which we do not speak; and as Seneca the rhetorician says *, there are exceptions so clear, that it is unnecessary to express them. The law condemns to suffer death whoever strikes his father: shall we punish him who has shaken and given a blow to his father, to recover him from a fainting fit? shall we punish a little infant, or a man in a delirium, who has lifted up his hand against the author of his life? In the first case the reason of the law is intirely wanting, and it is not applicable to the two others. We ought to restore what is intrusted to us: shall I restore what the robber has intrusted to me, at the time when the true proprietor makes himself known to me, and demands his substance? A man has left his sword with me: shall I restore it to him, when in a transport of fury he demands it, in order to kill an innocent person?*

§ 293.
Its use, in
order to
avoid fall-
ing into ab-
surdities, or
into what is
unlawful.

We use the restrictive interpretation to avoid falling into an absurdity (see § 282). A man bequeaths his house to one; and to another his garden, the only entrance into which is through the house. It would be absurd to suppose, that he had left the latter a garden into which he could not enter: we must then restrain the donation of the house, and understand, that it was given only upon the condition of allowing a passage to the garden. The same method of interpretation takes place, when a case is presented, in which the law or the treaty, according to the rigour of the terms, lead to something unlawful. This exception must then be made, since nobody can promise or ordain what is unlawful. For this reason, though assistance has been promised to an ally, in all his wars, no assistance ought to be given him when he undertakes one that is manifestly unjust.

§ 294.
Or in that
which is too
severe and
burthen-
some.

When a case arises in which it would be too prejudicial to any one to take a law or a promise according to the rigour of the terms, a restrictive interpretation is also then used, and we except the case, agreeably to the intention of the legislature, or of him who made the promise. For the legislature requires only what is just and equitable, and in contracts no one can engage in

* Lib. IV. *Declam.* XXVII.

favour of another in such a manner as to be essentially wanting to himself. It is then presumed with reason, that neither the legislator nor the contracting powers have intended to extend their regulation to cases of this nature, and that they themselves would have excepted them, had these cases presented themselves. A prince is no longer obliged to send succours to his ally, when he himself is attacked, and has need of all his forces for his own defence. He may also, without any perfidy, abandon an alliance when the ill success of the war has rendered his state on the brink of ruin, and made it necessary for him to treat with the enemy. Thus, towards the end of the last century, Victor Amedeus, duke of Savoy, found himself under the necessity of separating from his allies, and of receiving law from France, to avoid losing his estates. The king, his son, had, in 1745, good reasons to justify a separate peace: but his courage, and just views of his true interest, made him take the generous resolution to struggle against an extremity, which might have dispensed with his persisting in his engagements.

We have said above (§ 280), that we should take the expressions in the sense that agrees with the subject or the matter. The restrictive interpretation is also directed by this rule. *If the subject, or the matter treated of, will not allow that the terms of a disposition should be taken in their full extent, we should limit the sense according as the subject requires.* Let us suppose, that in a country, custom does not under fiefs hereditary in the line of consanguinity, properly so called, but only in the male line; if an act of infesment in that country declares, that the fief is given to a person for him and his male descendants; the sense of these last words ought to be restrained to the males descending from the males; for the subject will not admit of our understanding them also of the males who are the issue of the females, though they are in the number of the male descendants of the first possessor.

The following question has been proposed and debated: if promises include in themselves this tacit condition, that things shall remain in the state they are in; can a change happening in the state of things make an exception to the promise, and render it void? The principle drawn from the reason of the promise, ought to solve the question. *If it be certain and manifest, that the consideration of the present state of things was one of the reasons which occasioned the promise: that the promise has been made in consideration, or in consequence of that state of things; it depends on the preservation of things in the same state.* This is evident, since the promise was made only upon this supposition. When therefore the state of the things essential to the promise, and without which it certainly would not have been made, happen to become changed, the promise falls with its foundation: and in the particular cases where things cease for a time to be in the state that has produced the promise, or concurred to produce it, an exception ought there to be made. An elective prince being without children, promises an ally to take such measures, as he

shall be appointed his successor. He has a son born: who can doubt that the promise is not made void by this event? He who in a time of peace promises succours to an ally, owes him none when he has need of all his forces for the defence of his own dominions. The allies of a prince but little formidable, who have promised him a faithful and constant assistance, in order to increase his power, that he may obtain a neighbouring state by election or by marriage, will have a just foundation to refuse him assistance, and even to enter into an alliance against him, when they see him arrive to such a height of power, as to threaten the liberties of Europe. If the great Gustavus had not been killed at Lutzen, Cardinal de Richelieu, who had concluded an alliance for his master with that prince, whom he had drawn into Germany, and assisted with money, would perhaps have been obliged to traverse the designs of the conqueror, when become formidable; to set bounds to his astonishing progress, and to support his humbled enemies. The states-general of the United Provinces, in 1668, conducted themselves on these principles. They formed a triple alliance in favour of Spain, before their mortal enemy, against Louis XIV. their antient ally. It was necessary to oppose banks to a power which threatened to overflow all before it.

But we ought to be very reserved in the use of the present rule; it would be a shameful abuse to take advantage of every change that arises in the state of things to become disengaged from a promise: there are none of them upon which we can lay a foundation. The only state of things, on account of which the promise is made, is essential to it, and the change of that state alone can lawfully hinder or suspend the effect of that promise. This is the sense which ought to be given to that maxim of the civilians, *Conventio omnis intelligitur rebus sic stantibus*.

What we say of promises ought also to extend to the laws. The law which relates to a certain state of things can only take place in that state. We ought to reason in the same manner with respect to a commission. Thus Titus being sent by his father to pay his respects to the emperor, turned back on being informed of the death of Galba.

§ 297.
The interpretation of an act in unforeseen cases.

In unforeseen cases, that is, when the state of things are found such as the author of the disposition has not foreseen, and could not have thought of, *we should rather follow his intention than his words, and interpret the act as he himself would have interpreted it, had he been present, or conformably to what he would have done if he had foreseen the things that happened.* This rule is of great use to judges, and to all those in society who are appointed to put in force the bequests of citizens. A father appoints by will a tutor for his children, who are under age. After his death, the magistrate finds that the tutor he has nominated is an extravagant profligate, without substance or conduct; he therefore dismisses him, and establishes another, according to the Roman laws*; ad-

* *Digst. Lib. XXVI. Tit. III. De Conform. Tutor. L. g. 10.*

hering to the intention of the testator, and not to his words; for it is very reasonable to think, and it ought to be presumed, that the father never intended to give his children a tutor who would ruin them, and that he would have nominated another, had he known the vices of this.

When things which enter into the reason of a law or convention, are considered, not as actually existing, but only as possible; or in other words, when the fear of an event is the reason of a law or a promise, we can only except those cases where it is shown that the event is really impossible. The bare possibility of the event is sufficient to hinder all exceptions; if, for instance, a treaty declares that an army or a fleet shall not be conducted to a certain place, it shall not be permitted to conduct thither an army or a fleet, under a pretence that it is done without any design or injury. For the end of a clause of this nature, is not only to prevent a real evil, but also to keep all danger at a distance, and to avoid even the least subject of inquietude. It is the same with the law, which forbids walking in the night through the streets with a torch or a lighted candle. It would be of no use to him who violated the law, to say that no mischief happened, and that he carried the torch with such circumspection, that no ill consequence was to be feared; it is enough that the misfortune of causing a fire was possible, to render it a duty to obey the law; and he has violated it by occasioning a fear, which the legislature strove to prevent.

§ 198.
Of the reasons taken from the possibility, and not the existence of a thing.

We have observed, at the beginning of this chapter, that the ideas of men and their language are not always exactly determined. There is, doubtless, no language that does not afford expressions, words, or entire phrases, capable of a sense more or less extensive. Such a word agrees equally with the kind and the specie; that of *fault* comprehends *defect*, and *guilt*; many animals have only one name common to the two sexes, as a *partridge*, a *plover*, a *pigeon*, &c. when we speak of *horses* only with respect to the service they are of to men, we also comprehend under that name the *mares*. A word in the language of an art has sometimes a more, and sometimes a less extensive sense, than in vulgar use: the word *death*, among civilians, signifies not only natural death, but also civil death: *verbum*, in the Latin grammar, signifies only that part of speech called the verb; but in common use, it signifies any word in general. Frequently also the same phrase implies more things on one occasion, and less in another, according to the nature, or matter of the subject; to *send for succours*, sometimes extends to succours of soldiers, kept up and paid by him who sends them; sometimes to succours of troops, kept at the expence of him who receives them. It is then necessary to establish rules for the interpretation of these indeterminate expressions, to point out the cases where they ought to be taken in the more extensive sense, and those where they should be reduced to that which is more limited. Many of the rules we have already given may serve for this purpose.

§ 199.
Of expressions capable of an extensive and confined sense.

§ 307.
Of things
favourable,
and things
odious.

But we should particularly regard the famous distinction of things *favourable*, and things *odious*. Some have rejected it*; doubtless for want of understanding it. In fact, the definitions that have been given of what is *favourable* and *odious*, are not fully satisfactory, nor easily applied. After having maturely considered what the most able persons have written on the subject; the whole question, and the just idea of this famous distinction seems to me to be reduced to this: when the dispositions of a law or a convention are plain, clear, determinate, and applied with certainty, and without difficulty, there is no room for any interpretation, or any comment (§ 263). The precise point of the will of the legislature, or of the contracting powers, is what ought to be followed: but if their expressions are indeterminate, vague, or susceptible of a more or less extensive sense; if this precise point of their intention in the particular case in question, cannot be discovered and fixed by other rules of interpretation, it should be presumed, according to the laws of reason and equity: and for this purpose, it is necessary to pay attention to the nature of the things to which it relates. There are things in which equity allows of greater extension than restriction; that is, with respect to these things, the precise point of the will not being discovered in the expressions of the law, or the contract, it is safest, and more consistent with equity, to place this point, and to suppose it in the more extensive sense, than in the more confined sense of the terms; to extend the signification of the terms, than to limit them: these are the things called *favourable*. The *odious*, on the contrary, are those, where their restriction tends more certainly to equity, than their extension. Let us figure to ourselves the intention, or the will of the legislature, or the contracting powers, as a fixed point. If this point be clearly known, we should stop precisely there: if it be uncertain, we should endeavour at least to approach towards it. In things favourable, it is better to pass beyond this point, than not to reach it; in things odious, it is better not to reach it, than to pass beyond it.

§ 307.
What tends
to the com-
mon advan-
tage, and to
equality, is
favourable,
the contra-
ry is odious.

It will not now be difficult to shew, in general, what things are *favourable*, and what are *odious*. And first, *every thing that tends to the common advantage in conventions, or that has a tendency to place the contracting powers on an equality, is favourable*. The voice of equity requires, that the conditions between the parties should be equal; this is the general rule of contracts. We do not presume to think, without very strong reasons, that one of the contracting powers has intended to favour the other to his own prejudice; but there is no danger of extending what is for the common advantage. If it then be found, that the contracting powers have not made known their will with sufficient clearness, and with all the precision required, it is certainly more con-

* See Barbeyrac's Remarks on Grotius and Puffendorf.

formable to equity, to seek for this will in the sense most favourable to the common advantage and equality, than to suppose it in the contrary sense. From the same reason, every thing that is not for the common advantage, every thing that tends to destroy the equality of a contract, every thing that lays a burthen on only one of the parties, or that lays a greater load on him than on the other, is odious. In a treaty of strict friendship, union, and alliance, every thing which, without being burthenfome to any of the parties, tends to the common welfare of the confederacy, and to tie closer the knot, is favourable. In unequal treaties, and especially in unequal alliances, all the causes of inequality, and principally those that burthen an inferior ally, are odious. Upon this principle, that in case of doubt, we ought to extend what leads to equality, and to limit what destroys it, is founded on this well known rule; the cause of him who seeks to avoid a loss, is more favourable than that of him who endeavours to obtain profit: *incommoda vivantis melior, quam com-
moda petentis est causa* *.

All the things which, without too much burthening any one person in particular, are useful and salutary to human society, ought to be reckoned among the favourable things. For a nation is already under a natural obligation with respect to things of this nature; so if it has in this respect entered into any particular engagements, we run no risk in giving these engagements the most extensive sense they are capable of receiving. Can we be afraid of doing a violence to equity by following the law of nature, and in giving the utmost extent to obligations that are for the common advantage of mankind? Besides, things useful to human society, on this account, tend to the common advantage of the contracting powers, and are consequently favourable (see the preceding section). Let us, on the contrary, consider as odious, every thing that, in its own nature, is rather hurtful, than of use to the human race. The things that contribute to the blessings of peace are favourable; those that lead to war are odious.

Every thing that contains a penalty is odious. With respect to the laws, the whole world are agreed, that in case of doubt, the judge ought to be inclined to the merciful side, and that it is indisputably better to suffer a guilty man to escape, than to punish one who is innocent. In treaties, the penal clauses lay a burthen upon one of the parties; they are therefore odious (§ 301).

What tends to render an act null, and without effect, either in the whole or in part, and consequently every thing that introduces any change in the things already agreed upon, is odious. For men treat together for their common advantage; and if I have some advantage acquired by a lawful contract, I cannot lose it any otherwise than by renouncing it. When therefore I consent to new clauses, that seem to derogate from it, I can lose my right only so far as I have clearly given it up, and consequently these

* Quint. Instit. Orat. Lib. VII. Cap. IV.

new clauses ought to be taken in the strictest sense they will admit of; this is the case of things odious (§ 300). If what may render a treaty null and without effect, is contained in the treaty itself, it is evident that it ought to be taken in the strictest sense, and that most which is proper to allow the treaty to subsist. We have already seen, that we should reject every interpretation that tends to render the treaty null and without effect (§ 283).

§ 305.
That which
tends to
change the
present state
of things is
odious; the
contrary is
favourable.

We ought to place here in the number of things odious, whatever tends to change the present state of things. For the proprietor can only lose so much of his right as he has ceded of it; and in a case of doubt, the presumption is in favour of the possessor. It is less contrary to equity, not to give to a proprietor what he has lost the possession of by his negligence, than to strip the just possessor of what lawfully belongs to him. The interpretation then, is that we ought rather to hazard the first inconvenience, than the last. We might apply here, to many cases, the rule we have mentioned in § 301, that the cause of him who seeks to avoid a loss, is more favourable than that of him who desires to acquire gain.

§ 306.
Of things
mixed.

In short, there are things, which taken together, tend to what is *favourable* or *odious*, according to the side on which they are viewed. What derogates from treaties, or changes the state of things, is odious; but if it promotes the advantages of peace, it is, in this particular, favourable. Penalties always partake of what is odious: however, they may be referred to favourable things, on such occasions where they are particularly necessary for the safety of society. When it is required to interpret things of this nature, we ought to consider whether what is favourable in them, greatly exceeds what appears odious; whether the advantages they procure, by giving the terms the full extent they will bear, is much superior to what they have that is severe and odious; and, in this case, they are reckoned in the number of favourable things. Thus an inconsiderable change in the state of things, or in conventions, is reckoned as nothing, when it procures the precious advantages of peace. In the same manner, the fullest sense may be given to penal laws in critical occasions, where rigour is necessary to the safety of the state. Cicero caused the accomplices of Cataline to be executed by a decree of the senate, the safety of the republic rendering it improper to wait till they were condemned by the people. But without this disproportion, all other things being equal, the favour is on the side that offers nothing odious; I would say, that we ought to abstain from things that are odious, unless the benefit they procure, so greatly surpasses what there is in them that is odious, that it makes it in some sort disappear. While what is odious and what is favourable are ever so little ballanced in things that are mixed, they are placed in the rank of odious things; and that even from a consequence of the principles, on which we have founded the distinction between things favourable and odious (§ 300); because, in case of doubt, we should prefer the side, where we are
least

least exposed to offend against equity. We should reasonably refuse, in doubtful cases, to give succours, though a thing favourable, when it is required to give them against an ally, which would be odious.

The following are the rules of interpretation, which flow from the principles we have just laid down.

§ 207.
Interpretation of things favourable.

1. *When the subject relates to things favourable, we ought to give the terms all the extent they are capable of in common use; and if a term has many significations, the most extensive ought to be preferred.* For equity ought to be the rule of all men, wherever a perfect right is not exactly determined, and known with precision. When the legislature, or the contracting powers, have not expressed their will in terms that are precise and perfectly determinate, it is to be presumed, that they desire what is most equitable. Now, in relation to favourable things, the most extensive signification of the terms, is more agreeable to equity, than their confined signification. Thus Cicero, pleading for Cecina, justly maintained, that the interlocutory decree, which ordained the restoring to possession, him who has been driven from his inheritance, ought also to be extended to him who is hindered by force from entering into it *; and the Digest decides it in the same manner †. It is true, that this decision is founded on the rule taken from parity of reason (§ 290). For it is all one, in effect, to drive a person from his inheritance, and to hinder his entering into the possession of it by force; and there are in the two cases the same reasons for restoring him.

2. *In things favourable, the terms of art ought to be taken in the fullest extent they are capable of; not only according to common use, but also as technical terms, if he who speaks understands the art to which those terms belong, or if he conducts himself by the advice of men, who understand that art.*

3. *But we ought not from this single reason, that a thing is favourable, to take the terms in an improper signification; this is only allowable to be done, to avoid absurdity, injustice, or the nullity of the act, as is practised on every subject (§ 282, 283). For we ought to take the terms of an act in their proper sense, conformable to custom. at least, if we have not very strong reasons for deviating from it (§ 271).*

4. *Though a thing appears favourable when viewed in one particular light, yet if the propriety of the terms, in their full extent, lead to absurdity or injustice, their signification ought to be limited according to the rules given above (§ 293, 294). For here the thing becomes mixed, in this particular case, and even ought to be placed in the rank of things odious.*

5. *For the same reason, if there really flows neither absurdity nor injustice from the strict propriety of the terms, but a manifest equity, or great common utility, requires a restriction, we ought to*

* Orat. pro Cecina, Cap. XXIII.

† Digest. Lib. XLIII. Tit. XVI. De vi, & vi armata, Lib. I. & III.

adhere to the most limited sense which the proper signification can admit, even in an affair that appears favourable in its own nature. Because here the subject is still mixed, and in a particular case ought to be esteemed odious. As to the rest, we ought always to remember, that all these rules relate only to doubtful cases; since we ought not to strive to interpret what is clear and indeterminate (§ 263). If any one has clearly, and in due form, laid himself under an obligation to do what is burthensome, he has done it freely; and he cannot afterwards be allowed to complain of a want of equity.

§ 308.
Interpreta-
tion of
things
odious.

Since odious things are those where the restriction tends more certainly to equity, than their extension; and since we ought to take the part most agreeable to equity, when the will of the legislature, or of the contracting powers, is not exactly determined, and precisely known; we should in relation to things odious, take the terms in the most confined sense, and even, to a certain degree, may admit the figurative, to remove the burthensome consequences of the proper and literal sense, or what it contains that is odious. For we favour equity, and fly from what is odious, so far as that may be done, without going directly contrary to the tenour of the writing, and without doing violence to the terms. Now neither the confined, nor even the figurative sense, does any violence to the terms. If it is said in a treaty, that one of the allies shall furnish succours of a certain number of troops at his own expence, and that the other shall furnish the same number of auxiliary troops at the expence of him who sends for them: there is something odious in the engagements of the first, since that ally is more burthened than the other: but the terms being clear and express, there is no room for any restrictive interpretation. If in this treaty it was stipulated, that one of the allies should furnish succours of ten thousand men, and the other only five thousand, without mentioning the expence, it ought to be understood, that the succours should be supported at the expence of him who should receive them; this interpretation being necessary, in order that the inequality between the contracting powers might not be extended too far. Thus the cession of a right, or of a province made to conqueror, in order to obtain peace, is interpreted in its most confined sense. If it were true, that the limits of Acadia were always uncertain, and that the French were the lawful possessors of it, that nation would have had right on their side in pretending, that by the treaty of Utrecht they had ceded Acadia to the English, according to its most confined limits.

In matters of penalty, in particular, when they are really odious, we ought not only to confine the terms of the law, or of the contract, to their strictest signification, and adopt the figurative sense, according as the cases require, or agree with it; but admit of reasonable excuses, which is a kind of restrictive interpretation, tending to free the party from the penalty.

The same thing must be observed with respect to what may
render

render an act null and without effect. Thus when it is agreed, that the treaty shall be broken, as soon as one of the contracting powers shall fail to observe it; it would be as unreasonable, as it would be contrary to the end of the treaty, to extend this clause to the slightest faults; and to the cases where he who has committed them, is capable of bringing a just excuse.

Grotius proposes this question: If in a treaty, where mention is made of allies, we ought to extend it only to those who were so at the time of the treaty, or to all the allies present and to come *? And he gives for example this article of the treaty concluded between the Romans and Carthaginians, after the war of Sicily: that "neither of the two nations should do any injury to the allies of the other." In order to understand this part of the treaty, it is necessary to call to mind, the barbarous law of nations observed by the antients: they thought themselves allowed to attack, and to treat as enemies, all to whom they were not united by any alliance. The article then signifies, that on both sides they should treat as friends the allies of their ally, and abstain from molesting or invading them: upon this footing it was in all respects so favourable, so conformable to humanity, and to the sentiments which ought to unite two allies, that it should, without difficulty, be extended to all the allies present and to come. We cannot say that this clause has an odious tendency, because it puts a constraint upon the liberty of a sovereign state, or because it tended to break an alliance. For by the engaging not to injure the allies of another power, they did not take away the liberty of making war against them, if they gave them a just cause for doing it; and when a clause is just and reasonable, it does not become odious, from the sole reason that it may occasion the rupture of the alliance. Upon this footing there would be no treaty but what was odious. This reason, which we have touched upon in the preceding section, and in § 304, takes place only in doubtful cases: for example, here it ought to hinder the too easily concluding that the Carthaginians had attacked, without cause, an ally of the Romans. The Carthaginians might, without prejudice to the treaty, attack Saguntum, if they had a lawful reason for doing it, or in virtue of the voluntary law of nations, for only an apparent or specious cause (Prelim. § 21). But they might have attacked, in the same manner, the most ancient ally of the Romans; and these last might also, without breaking the peace, have confined themselves to the succouring of Saguntum. At present the allies on both sides are comprehended in the treaty: but this does not mean, that one of the contracting powers may not make war on the allies of the other, if they give them cause for it; but only, that if any quarrel arises between them, they reserve to themselves the power of assisting their most ancient ally, and in this sense the future allies are not comprehended in the treaty.

§ 309.
Examples.

* *Lib. II. Cap. XVI. § 13.*

Another example mentioned by Grotius, is also taken from a treaty concluded between Rome and Carthage. When this last city was reduced to distress by Æmilianus Scipio, and obliged to capitulate, the Romans promised, "that Carthage should remain free, or in possession of the privilege of being governed by her own laws *." However, these merciless conquerors at length pretended, that this promised liberty regarded the inhabitants, and not the city: they required that Carthage should be razed, and that the unhappy inhabitants should settle in a place farther distant from the sea. One cannot read the account of this perfidious and cruel treatment, without being concerned that the great, the amiable Scipio was obliged to be the instrument of it. Without stopping to examine this chicanery of the Romans, with regard to what might have been expected by Carthage; certainly the liberty promised to the Carthaginians, though much restrained, even by the situation of things, might well comprehend, at least, the right of remaining in their city. To find themselves obliged to abandon it, in order to settle elsewhere, to lose their houses, their port, and the advantages of their situation, was a subject incompatible with the least degree of liberty, and such considerable losses they could not oblige themselves to suffer, but by the most express and formal terms.

§ 310.
How we
ought to in-
terpret acts
of pure li-
berality.

Liberal promises, benefits, and rewards, are in their own nature among the number of favourable things, and receive an extensive interpretation, at least, if they are not burthenfome to the benefactor; if they are not too chargeable to him; or if other circumstances do not manifestly shew, that they ought to be taken in a limited sense. For goodness, kindness, beneficence, and generosity are liberal virtues; they do not act in a penurious manner, and know no other bounds than those set by reason. But if the benefit falls too heavy upon him who grants it, in this respect it tends to what is odious; in case of doubt, equity therefore will not permit us to presume, that it has been granted, or promised, according to the utmost extent of the terms: we ought then to confine ourselves to that restrained signification which the words are capable of receiving; and thus reduce the benefit, within the bounds of reason. The same takes place, when other circumstances manifestly point out the restrained signification, as the most equitable.

Upon these principles, the benefits of a sovereign are commonly taken in the full extent of the terms †. It is not presumed, that he will find himself over-burthened; it is a respect due to majesty to believe, that he has been led to it, from good reasons. They are then entirely favourable in themselves, and in order to

* *Atroxque, Appi. De Bello Punico.*

† This is the decision of the Roman law, Javolenus says: *Beneficium imperatoris, quam plenissime interpretari debemus; and he gives this reason for it, quod à divina ejus indulgentia proficiscatur. Digest. Lib. I. Tit. IV. De Condit. Prae. L. 3.*

restrain them, it must be proved that they are burthensome to the prince, or prejudicial to the state. Besides, we ought to apply to acts of pure liberality, the general rule established above (§ 270); if these acts are not precise and very determinate, they should be understood of what the author had probably in his mind.

Let us conclude this subject of interpretation, with what relates to the collision or opposition of the laws or treaties. We shall not here speak of the collision of a treaty with the law of nature: this last will doubtless obtain the advantage, as we have proved elsewhere (§ 160, 161, 170, and 293). There is a collision or opposition between two laws, two promises, or two treaties, when a case is presented in which it is impossible to fulfil both at the same time, though otherwise these laws, or these treaties, are not contradictory, and may be both fulfilled at different times. They are considered as contrary in this particular case, and it is required to shew which deserves the preference, or to which an exception ought to be made. In order not to deceive ourselves, and that we make the exception conformably to reason and justice, we should observe the following rules.

1. *In all cases where what is only permitted, is found incompatible with what is prescribed; this last has the advantage*, for the mere permission imposes no obligation to do or not to do; what is permitted, is left to our will; we may do it, or we may not do it. But we have not the same liberty with respect to what is prescribed; we are obliged to do it. The first then can produce no obstacle, and, on the contrary, what is permitted in general, is not so in this particular case, were we cannot take advantage of the permission without violating a duty.

2. *In the same manner, the law or the treaty which permits, ought to yield to the law or the treaty which forbids.* For the prohibition should be obeyed, and what was in its own nature, or in general permitted, is found impracticable when it cannot be done without violating a prohibition; the permission in this case no longer takes place.

3. Every thing being otherwise equal, *the law or the treaty which ordains, yields to the law or the treaty which forbids.* I say all things otherwise equal, for many other reasons may be found that will form an exception against the prohibitive law, or the treaty which forbids. The rules are general, each relates to an abstract idea, and shews what follows from that idea, without prejudice to the other rule. Upon this footing it is easy to see, that in general, if we cannot obey an affirmative law, without violating a negative law, we should abstain from fulfilling the first: for the prohibition is absolute in itself; while every precept, every command, is in its own nature constitutional; it supposes the power, or a favourable opportunity of doing what is prescribed. Now when one cannot do it, without violating a prohibition, the opportunity is wanting, and this contradiction of the law produces a moral impossibility of acting: for what is in general prescribed, is no longer so in the case where it can-

§ 311.
Of the collision of the laws or treaties.

§ 312.
1. Rule in cases of collision.

§ 313.
2. Rule.

§ 314.
3. Rule.

not be done without committing an action that is forbidden *. Upon this foundation it is generally agreed, that it is not permitted to employ unlawful means to accomplish a laudable end; as for example, to rob in order to give alms. But it is evident, that the question here regards an absolute prohibition, or cases in which the general prohibition is truly applicable, and thence equivalent to an absolute prohibition: there are many prohibitions where circumstances form an exception. We shall explain our meaning by an example. It is expressly forbidden, from reasons unknown to me, to go to a certain place under any pretence whatsoever. I am ordered to carry a message; I find all the other passages shut; I therefore return back the same way I came, rather than take advantage of that which is so absolutely forbidden. But if this passage is forbidden in general, only to avoid some damage to the fruits of the earth, it is easy for me to judge, that the orders I carry ought to form an exception.

As to what relates to treaties, we are not obliged to accomplish what a treaty prescribes, any farther than we have the power; now we have not the power of doing what another treaty forbids: in this case then, the collision forms an exception to the treaty which prescribes, and that which forbids has the advantage: but all other things being equal, we are going to shew by an example, that a treaty cannot derogate from another more antient, concluded with another state, nor hinder its effect, either directly or indirectly.

§ 315.
4. Rule.

4. The date of the laws or treaties furnishes new reasons for establishing the exception, in the case where there is an opposition. *If the opposition is found between two affirmative laws, or two affirmative treaties, concluded between the same persons, or the same states, the last date has the advantage over the more antient.* For it is manifest, that these two laws, or two treaties springing from the same power, the last may derogate from the first. But it is always to be supposed, that things are otherwise equal: if there be a collision between two treaties made with two different powers, the more antient has the advantage. For no engagement can be entered into, contrary to it, in the treaty afterwards made, and if this last be found, in any case, incompatible with the more antient one, its execution is considered as impossible; because the person promising, had not the power of acting contrary to his antecedent engagements.

§ 316.
5. Rule.

5. *Of two laws, or two conventions, in all other things equal, we ought to prefer that which is the least general, and which approaches nearer to the affair to which it relates.* Because what is special is liable to fewer exceptions than what is general; it is commonly more particular, and it appears to have been more warmly desired. Let us make use of the following example of

* The law which forbids is in this case an exception to that which ordains: "Deinde utra lex jubeat utra vetet. Nam sæpe ea, quæ vetat, quasi exceptione quædam corrigere videtur illam, quæ jubet." *Cicero. De Inventione, Lib. II. n. 145.*

Puffendorf *: a law forbids appearing in public with arms during the days of a festival; another law ordains marching in arms to to a port, as soon as the alarum-bell is heard. The alarum-bell is sounded on one of the days of the festival: and this last law should be obeyed, it forming an exception to the first.

6. *What will suffer no delay, ought to be preferred to what may be done at another time.* For this is a method of reconciling every thing, and fulfilling both obligations; but if people preferred that which might be accomplished at another time, they would put themselves under the necessity of failing with respect to the first. § 317. 6. Rule.

7. *When two duties are found incompatible, the most considerable, and that which comprehends the higher degree of honesty, and utility, merits the preference.* This rule has no need of proof. But as it relates to duties that are equally in our power, and in a manner in our choice, care should be taken, not to make a false application of it to two duties that are not really incompatible, where one of them not giving place to the other; the obligation which binds to the first, takes away the liberty of fulfilling the other. For example, it is more laudable to defend a nation against an unjust aggressor, than to assist another in an offensive war. But if this last is the more antient ally, we are not at liberty to refuse him succours in order to give them to another, for we are already bound: there is not, strictly speaking, any competition between these two duties; they are not in our choice: the more antient engagement renders, for the present, the second duty impracticable. However, if it be required to preserve a new ally from certain ruin, and the antient one is not reduced to the same extremity, this will be a case of the foregoing rule. § 318. 7. Rule.

As to what relates to the laws in particular, we owe, doubtless, the preference to the most important and the most necessary. This is the grand rule in their opposition, it is that which merits most attention, and it is also that which Cicero places at the head of all the rules he gives on the subject *. It is acting contrary to the general aim of the legislature, and contrary to the great end of the laws, to neglect one of great importance, under the pretence of observing another less interesting, and less necessary: this is, in fact, to sin; for a less good, if it excludes a greater, partakes of the nature of evil.

8. *If we cannot acquit ourselves at the same time of two things, promised to the same person, he is to chuse which we ought to accomplish;* for in this case he may dispense with the other, and then there will, be no longer any opposition. But if we cannot § 319. 8. Rule.

* Jus Gent. Lib. V. Cap. XII. § 23.

+ Primum igitur leges oportet contendere, considerando, utra lex ad majores, hoc est ad utiliores, ad honestiores, ac magis necessarias res pertineat. Ex quo conficitur ut, si leges duæ, aut si plures, aut quotquot erunt, conservari non possint, quia discrepent inter se; ea maxime conservanda putetur, quæ ad maximas res pertinere videatur. Cicero. ubi supra.

obtain any information of his will, we ought to presume, that he would desire what is most important, and prefer that. And in case of doubt, we should do that to which we are most strongly obliged: it being presumed that he would bind us more strongly to that which is of the greatest moment.

§ 320.
9. Rule.

9. Since the strongest obligation has the advantage over the weaker, if it happens that a treaty confirmed by oath comes in opposition to a treaty that was not sworn to, every thing else being equal, the first has the advantage. Because the oath adds a new force to the obligation. But as it makes no change in the nature of treaties (§ 225, and following); it cannot, for example, give the advantage to a new alliance, to the prejudice of the more ancient one, though that treaty has not been confirmed by an oath.

§ 321.
10. Rule.

10. By the same reason, all other things being equal, what is imposed under a penalty, has the advantage of what is not enforced by one; and what bears a greater penalty, over what bears a less. For the sanction and penal convention strengthen the obligation: they prove that the thing was more warmly desired *, and that in proportion as the penalty is more or less severe.

§ 322.
A general
remark on
the manner
of observ-
ing all the
preceding
rules.

All the rules contained in this chapter ought to be combined together, and the interpretation made in such a manner, that it may be accommodated to all, so far as they are applicable to the case. When these rules appear opposite, they reciprocally balance and limit each other, according to their strength and importance, and according as they more particularly belong to the case in question.

C H A P. XVIII.

Of the Manner of terminating the Disputes between Nations.

§. 323.
A general
direction on
this subject.

THE differences that arise between nations, or their conductors, have their source either from rights in litigation, or from injuries. A nation ought to preserve the rights which belong to it, and the care of its safety and glory, does not permit it to suffer injuries. But in fulfilling what it owes to itself, it is not permitted to forget its duties towards others. These two views combined together, furnish the maxims of the law of nations, on the manner of terminating the disputes between different states.

§. 324.
Every na-
tion is obli-
ged to give
satisfaction
with respect
to the just
complaints
of another.

All that we have said in Chap. I. IV. and V. of this book, dispense with our proving here, that a nation ought to do justice to all others with respect to their pretensions, and to remove all their just subjects of complaint. It is then obliged to render to every one what is its due, to leave them in the peaceable enjoy-

(*) This is also the reason which Cicero gives: *Nam maxime conservanda est lex, quæ diligentissima, et sancta est, vel potius, quæ diligentissimè sancta est.* Cicero, ubi supra.

ment of their rights, to repair the damage it may have caused, or the injury it has done; to give a just satisfaction for an injury it cannot repair, and reasonable sureties for what has given cause of fear. These are so many maxims evidently dictated by that justice which the law of nature imposes no less on nations than on individuals.

Every one is permitted to recede from his rights, to abandon a just subject of complaint, or to forget an injury. But the conductor of a nation is not, in this respect, so free as a private person. The latter may hear only the voice of generosity, and in an affair which interests none but himself alone, deliver himself up to the pleasure he finds in doing good, to his love of peace and tranquillity. The representative of a nation, the sovereign cannot consult himself, cannot abandon himself to his own inclination. He ought to regulate his conduct on the greatest advantage of the state, combined with the universal good of human nature, from which it is inseparable. It is necessary, that on all occasions, the prince should consider with wisdom, and execute with firmness, what is most salutary to the state, most conformable to the duties of the nation towards others; and that he should at the same time consult justice, equity, humanity, sound policy, and prudence. The rights of the nation are benefits, of which the sovereign is only the administrator, and he ought to dispose of them no farther than as he has reason to presume that the nation itself would dispose of them. And as to what relates to injuries, it is often laudable in a citizen generously to pardon them. He lives under the protection of the laws, the magistrate knows how to defend, or to revenge him on the ungrateful and miserable wretches, who, emboldened by his goodness, offend him anew. A nation has not the same defence: seldom is it safe for it to dissemble or to pardon an injury, unless it be manifestly in a situation to crush those who are so rash as to dare to offend it. It is then glorious to pardon those who acknowledge their faults:

\$ 325.
How nations may abandon their rights and just complaints.

Parcere subjectis, & debellare superbos:

And it may do this with safety. But between powers that are nearly equal, suffering an injury, without requiring a complete satisfaction, is almost always imputed to weakness or cowardice; it is the means of soon receiving from them those that are the most atrocious. Why do we often see quite the contrary practised by those who imagine that they are elevated far above other men? Scarce can the weak, who have the misfortune to offend them, make submissions that are sufficiently humbling: they behave with more moderation to those whom they cannot punish without danger.

If none of the nations, who have disputes with each other, think proper to abandon their rights or pretensions, the law of nature, which recommends peace, concord, and charity, obliges them

\$ 326.
Of the means which the law of na-

ture recom-
mends to
put an end
to disputes.
1. Of ami-
cable accom-
modations.

them to attempt the mildest methods of terminating their differences. These are first an amicable accommodation. Let every one with tranquillity and good faith examine the subject of the dispute, and dispense justice, or let him whose right is too uncertain, voluntarily renounce it. There are even occasions where it may be convenient for him who has the clearest right, to renounce it for the preservation of peace: prudence consists in knowing them. To renounce a right in this manner, is not to abandon or neglect it. You are under no obligation for what you abandon: but you make a friend by ceding amicably what is the subject of dispute.

§. 327.
Of negotia-
tion.

Negotiation is a second method of peacefully terminating disputes, in which, without precisely deciding the justice of the opposite pretensions, they recede on both sides, and agree that each shall have the thing contested, or they agree to give it entirely to one of the parties, on condition of certain advantages granted to the other.

§. 328.
Of media-
tion.

Mediation, in which a common friend interposes his good offices, is often found effectual, to engage the contending parties to draw towards a reconciliation, to come to a good understanding, and to agree, either to relinquish their rights, or if the affair relates to an injury, to offer and accept a reasonable satisfaction. This office requires as much rectitude as prudence and dexterity. The mediator ought to observe an exact impartiality; he should soften reproaches, calm resentments, and draw minds towards each other. His duty is to favour what is right, and to cause to be restored what belongs to each: but he ought not scrupulously to insist on rigorous justice. He is a moderator, and a judge; his business is to procure peace; and to bring him who has right on his side, if it be necessary, to relax something with a view to so great a blessing.

The mediator is not the guarantee of the treaty he has brought to a conclusion, unless he has expressly entered into the guaranty. This is an engagement of too great consequence to burthen any one with, without his consent clearly shewn. At present, when the affairs of the sovereigns of Europe are so connected, that each has an eye on what passes between those who are most distant, mediation is a method of reconciliation much used. Does any disputes arise? The friendly powers, those who are afraid of seeing the flame of war kindled, offer their mediation, and make overtures of peace and accommodation.

§. 329.
Of arbitra-
tion.

When sovereigns cannot agree about their pretensions, and yet desire to maintain, or to restore peace, they sometimes trust the decision of their disputes to arbitrators, chosen by common agreement. As soon as the compromise is concluded, the parties ought to submit to the sentence of the arbitrators; they have engaged to do this, and the faith of treaties should be regarded.

However, if by a sentence manifestly unjust, and contrary to reason, the arbitrators have stripped themselves of their quality, their judgment deserves no attention; the parties submit to it

only

only upon doubtful questions. Suppose the arbitrators, in order to repair some offence, condemn a sovereign state to become subject to the offended; will any sensible man say, that this state ought to submit? If the injustice is of small consequence, it should be borne for the sake of peace; and if it is not absolutely evident, we ought to support it, as an evil to which we have willingly consented to expose ourselves. For if it were necessary to be convinced of the justice of a sentence in order to submit to it, it would be of very little use to take arbitrators.

We need not fear, that in granting the parties the liberty of not submitting to a sentence, that is manifestly unjust and unreasonable, we should render the arbitration useless; besides, this decision is not contrary to the nature of the submission, or compromise. There can be no difficulty in it, but in the case of a vague and unlimited submission, in which they have neither precisely determined what constitutes the subject of the quarrel, nor marked out the limits of the opposite pretensions. It may then happen, as in the example just alledged, that the arbitrators may exceed their power, and pass their judgment on what has not been really submitted to their decision: and being called to judge of the satisfaction a state ought to make for an offence, they may condemn it to become subject to the offended. Certainly that state never gave them so extensive a power, and their absurd sentence is not binding. To avoid all difficulty, and to take away every pretence from bad faith, it is necessary to determine exactly in the compromise, the subject of the dispute, the respective and opposite pretensions, the demands of the one, and the oppositions of the other. This is what is submitted to arbitrators, and upon this they promise to adhere to their judgment. If then their sentence is confined within these bounds, it is necessary to submit to it. It cannot be said that it is manifestly unjust, since it is pronounced on a question which the discussion of the parties renders doubtful, and which has been submitted as such. In order to be free from such a sentence, it should be proved by indubitable facts, that it was produced by corruption, or a flagrant partiality.

Arbitration is a method very reasonable, and very conformable to the law of nature, in determining all differences that do not directly interest the safety of the nation. Though the strict right may be mistaken by the arbitrator, it is still more to be feared that it will be overwhelmed by the fate of arms. The Swiss have had the precaution, in all their alliances among themselves, and even in those they have contracted with the neighbouring powers, to agree before-hand, on the manner in which their disputes were to be submitted to arbitrators, in case they could not adjust them in an amicable manner. This wise precaution has not a little contributed to maintain the Helvetic Republic in that flourishing state which secures its liberty, and renders it respectable throughout Europe.

§ 33.
Of conferences and congresses.

In order to put in practice any of these methods, it is necessary to speak with each other and to confer together. Conferences and congresses are then a way of reconciliation, which the law of nature recommends to nations, as proper to put an amicable period to their differences. Congresses are assemblies of plenipotentiaries appointed to find out methods for a reconciliation, and to discuss and adjust their reciprocal pretensions. In order to expect an happy success from them, it is necessary that these assemblies should be formed and directed by a sincere desire of peace and concord. Europe has, in the present age, seen two general congresses, that of Cambray*, and that of Soissons†. Dull farces played on the political theatre, in which the principal actors were less desirous of producing an accommodation than of appearing to desire it.

§ 34.
A distinction to be made between evident and doubtful cases.

In order now to see how, and to what degree a nation is to have recourse, or to submit to these various methods, and on which it ought to fix, it is necessary, first to distinguish between the cases that are evident, and those that are doubtful. Does it relate to a right that is clear, certain, and incontestible? A sovereign, if he has sufficient strength, may boldly pursue and defend it, without putting it to a compromise. Shall he suffer to be contested and debated a thing that manifestly belongs to him, and which is disputed without the least shadow of right? Much less will he submit it to arbitration. But he ought not to neglect those methods of reconciliation, which, by putting his right to a compromise, may make his adversary hear reason: such are mediation and conferences. Nature gives us no right to have recourse to force, but where mild and pacific methods are ineffectual. It is not permitted to be so inflexible in uncertain and doubtful questions. Who shall dare to pretend, that another suddenly and without examination, shall abandon to him a litigated right? This would be a means of rendering war perpetual and inevitable. The two contending powers may be equally possessed of good faith: why then should one yield to the other? In such a case they can only demand a negotiation, a conference, or an arbitration.

§ 35.
Of essential rights, and those of less importance.

In the disputes that arise between sovereigns, it is necessary plainly to distinguish the essential rights from those of less importance; for, in regard to these, a very different conduct is to be observed. A nation is under many obligations of duty towards itself, towards other nations, and towards the whole human society. We know that, in general, the duties towards ourselves have the advantage over those we owe to others: but this ought only to extend to the duties in which some proportion subsist between them. We cannot refuse, in some degree, to forget ourselves with respect to interests that are not essential, to make some sacrifices in order to assist other persons, and especially for the greater benefit of the human society: and let

* In 1724.

† In 1728.

us even remark, that we are invited by our own advantage, by our own safety, to make these generous sacrifices; for the private good of each is intimately connected with the general happiness. What ideas should we have of a prince or a nation, who should refuse to give up the smallest advantage to procure the world the inestimable blessings of peace? Every power owes then this respect to the happiness of human society, to appear open to every method of reconciliation, when it relates to interests that are not essential, or that are of small consequence. If he exposes himself to the loss of something by an accommodation, a negotiation or an arbitration, he ought to be sensible what are the dangers, the evils, the calamities of war, and to consider that peace is well worth a small sacrifice.

But if any one would ravage from a nation an essential right, or a right without which it could not hope to subsist; if an ambitious neighbour threatens the liberty of a republic; if he resolves to subdue it, and bring it into subjection, that republic will take council only from its courage. It will not even attempt to wait the method of conferences on so odious a pretension: it will bring into this quarrel all its efforts, its last resources, and all the best blood it is capable of shedding. It is risking every thing, only to listen to the least proposition: then they might truly say,

Una salus——nullam sperare salutem.

And if fortune is not favourable, a free people will prefer death to servitude. What would have become of Rome, had she listened to timid councils, when Hannibal was encamped before her walls? The Swiss, always so ready to embrace pacific measures, or to submit to those that are reasonable, in disputes less essential, constantly reject every idea of composition with those who have a design on their liberties: they have even refused to submit them to arbitration, or to the judgment of the Emperors*.

In things doubtful and not essential, if one of the parties will not listen, either to conferences, an accommodation, a negotiation, or a compromise; the other has only the last resource for the defence of himself and his rights, the means of force: and his arms are just against so untractable an adversary. For in a doubtful cause, we can only demand all the reasonable methods of elucidating the question, and of deciding or accommodating the dispute (§ 331).

But let us never lose sight of what a nation owes to its own security, or that prudence by which it ought constantly to be

* When, in the year 1355, they submitted their differences with the dukes of Austria, in relation to the countries of Zug and Claris, to the arbitration of Charles IV. it was not without this preliminary condition, that the emperor should not touch the liberties of these countries, nor their alliance with the other cantons. *Tschudi*, p. 429, and following, *Stettin*, p. 77. *History of the Helvetic Confederacy*, by Dr. Watterville, Book IV. at the beginning.

tempting
other mea-
sures.

directed. It is not always necessary to authorise the having recourse to arms, that all the methods of reconciliation have been expressly rejected; it is sufficient, that there is the utmost reason to believe, that the enemy would not enter into these measures with sincerity; that the issue of them could not be happy, and that a delay could only tend to put the state in greater danger of being oppressed. This maxim is incontestible, but the application of it to practice is very delicate. A sovereign who would not be considered as a disturber of the public repose, will not be induced abruptly to attack him who has not refused pacific measures, if he is not able to justify to the whole world that he has reason to consider these appearances of peace as an artifice tending to amuse and to surprize him. To pretend to be authorised by his mere suspicions alone, is to shake all the foundations of the safety of nations.

§ 335.
Of the voluntary law
of nations
on this subject.

At all times the faith of one nation has been suspected by another, and sad experience but too plainly proves, that this distrust is not ill-founded. Independence and impunity are a touchstone that discovers the faults of the human heart: the private man adorns himself with candour and probity; and when he wants the reality, his dependence frequently obliges him to shew, at least in his conduct, the appearance of these virtues. The great man, who is independent, boasts still more of them in his discourse; but as soon as he finds himself sufficiently strong, if he has not an heart of a stamp unhappily very uncommon, he scarcely endeavours to save appearances: and if powerful interests intervene, he will permit proceedings that would cover a private person with shame and infamy. When, therefore, a nation pretends, that it would be dangerous to attempt pacific measures, it has but too many reasons that may give a colour to its precipitation, in having recourse to arms. And as, in virtue of the natural liberty of nations, each has a right to judge from conscience, of what it ought to do, and has a right to regulate, according to its dictates, its conduct with respect to its duty, in every thing that is not determined by the perfect rights of another (Prelim. § 20); it is for every one to judge, whether he is in a situation that will admit of pacific measures, before he has recourse to arms. Now the voluntary law of nations ordains, that from these reasons we esteem lawful what a nation thinks proper to do in virtue of its natural liberty (Prelim. § 21); by this voluntary law we hold as just among nations, the arms of him who in a doubtful cause abruptly undertakes to force his enemy to enter into a negotiation, without having before attempted pacific measures. Louis XIV. was in the midst of the Netherlands before it was known in Spain that he laid claim to part of the sovereignty of those rich provinces, in right of the queen his wife. The king of Prussia, in 1741, published his manifesto in Silesia, at the head of sixty thousand men. These princes might have wise and just reasons for acting thus: and this is sufficient at the tribunal of the voluntary law of

nations,

nations. But a thing tolerated by necessity in this law, may be found very unjust in itself. A prince who puts it in practice, may render himself very guilty in the sight of his own conscience, and very unjust towards him whom he attacks, though he has no account to give to nations, as he cannot be accused of violating the general rule, which they observe among themselves. But if he abuses this liberty, he renders himself odious, and suspected by the nations : he authorises them to enter into an alliance against him, and thus at the time when he seems to advance his affairs, he sometimes ruins them past recovery.

A sovereign ought to shew in all his quarrels, a sincere desire of rendering justice, and preserving peace. He is obliged, before he take up arms, and after having taken them up also, to offer equitable conditions, and then alone his arms become just against an obstinate enemy, who refuses to listen to justice or to equity.

§ 336.
They ought always to offer equitable conditions.

It is for the plaintiff to prove his right ; for he ought to shew a good foundation for demanding a thing he does not possess. He must have a title, and people are not obliged to pay any regard to it, any farther than he shews its validity. The possessor may then remain in possession, till it is made appear to him, that his possession is unjust. While this is not done, he has a right to maintain himself in it, and even to recover it by force, if he is stripped of it. Consequently it is not permitted to take arms to obtain the possession of a thing, to which the person has but an uncertain or doubtful right. He may only oblige the possessor, if it be necessary, by force of arms, to discuss the question, to accept some reasonable method of decision or of accommodation ; or, in short, to negotiate upon an equitable footing (§ 333).

§ 337.
The right of the possessor in matters of doubt.

If the subject of the dispute be an injury received, the offended ought to follow the rules we have just established. His own advantage, and that of human society, oblige him to attempt, before he takes up arms, all the pacific methods of obtaining, either the reparation of the injury, or a just satisfaction ; at least, if he has not good reason to dispense with it (§ 334). This moderation, this circumspection, is so much the more proper, and commonly even indispensable, as the action we take for an injury does not always proceed from a design to offend us, and is sometimes rather a mistake than an act of malice : frequently it even happens, that the injury is done by inferior persons, without their sovereign having any share in it : and on these occasions it is natural to presume, that he would not refuse us a just satisfaction. When some inferior persons violated, not long ago, the territory of Savoy, in carrying from thence a noted chief of the smugglers, the king of Sardinia caused his complaints to be carried to the court of France ; and Louis XV. did not think it beneath him to send an ambassador extraordinary to Turin to give satisfaction for that violence. Thus an affair of so delicate a nature was terminated in a manner equally honourable to the two kings.

§ 338.
How we ought to pursue the reparation of an injury.

When a nation cannot obtain justice, either for a loss or an injury, it has a right to do itself justice. But before it declares

§ 339.
Of retaliation.

war, of which we shall treat in the following Book, there are various methods practised among nations, which remain to be treated of here. We have placed in the number of these methods of obtaining satisfaction, what is called the law of retaliation, according to which we make another suffer exactly so much evil as he has done. Many have extolled this law, as being derived from the most strict justice, and can we be astonished at their having proposed it to princes, when they have even dared to give it for a rule to the Deity himself: the ancients called it the law of Rhadamanthus. This idea only sprung from the obscure and false notions by which they represented to themselves evil as essentially, and in its own nature worthy of punishment. We have shewn above (Book I. § 169), what is the true source of the right of punishing *; where we have laid down the true and just proportion of penalties (Book I. § 171.). Let us say then, that a nation may punish another which has done it an injury, as we have shewn above (see Chap. IV. and VI. of this Book), if it refuses to give a just satisfaction; but it has not a right to extend the penalty beyond what is required by its own safety. Retaliation, unjust between private persons, would be much more so between nations, because here the punishment would, with difficulty, fall on those who had done the injury. What right would you have to cut off the nose and ears of the ambassador of a barbarian, who had treated yours in the same manner? As to those reprisals in time of war which partake of the nature of retaliation, they are justified on other principles, and we shall speak of them in their place. All that is true in this idea of retaliation is, that every thing being equal, the pain ought to bear some proportion to the evil required to be punished; the end, and even the foundation of punishment requiring thus much.

§ 340.
Various
ways of
punishing,
without
having re-
course to
arms.

It is not always necessary to have recourse to arms, in order to punish a nation; the offended may take from it, by way of punishment, the privileges it enjoys in his dominions, seize, if he has an opportunity, on some of the things that belong to it, and detain them till it has given him a just satisfaction.

§ 341.
Of the law
of retor-
tion.

When a sovereign is not satisfied with the manner in which his subjects are treated by the laws and customs of another nation; he is at liberty to declare, that he will treat the subjects of that nation in the same manner as his are treated. This is what is called the *law of retortion*. There is nothing in this, but what is conformable to just and sound politics. No one can complain if he is treated as he treats others. Thus the king of Poland, Elector of Saxony, took advantage of the law of escheatage only against the subjects of the princes who made the Saxons submit to it. This law of retortion may also take place with respect to certain regulations, of which we have no right to complain, and which we

* Nam, ut Plato ait, nemo prudens punit] quia peccatum est, sed ne peccet. *Seneca de Ira.*
are

are even obliged to approve, though it is proper to guard against their effects, by imitating them. Such are the orders relating to the exportation of certain commodities or merchandize. It is also frequently, not convenient to make use of retortion: in this respect we ought to follow the dictates of prudence.

Reprisals are used between nation and nation to do justice to themselves, when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another; if it refuses to pay a debt, to repair an injury, or to make a just satisfaction, the other may seize what belongs to it, and apply it to its own advantage, till it has obtained what is due for interest and damage, or keep it as a pledge till a full satisfaction has been made. In the last case, it is rather a stoppage or a seizure, than reprisals: but they are frequently confounded in common language. Effects seized are preserved while there are any hopes of obtaining satisfaction, or justice. As soon as this hope is lost, they are confiscated, and then the reprisals are accomplished. If the two nations, upon this quarrel, come to an open rupture, satisfaction is considered as refused, from the moment of the declaration of war, or the first hostilities, and then also the effects seized may be confiscated.

The law of nations permits reprisals only upon a cause that is evidently just, or for a debt that is extremely clear. For he who forms a doubtful pretension, can at first demand only an equitable examination of his right. In the second place, he should, before he proceeds so far, have in vain demanded justice, or, at least, have the utmost reason to believe that it would be in vain for him to demand it. Then alone he may right himself. It would be too contrary to the peace, to the repose and safety of nations, to their mutual commerce, and to the duties which bind them to each other, for any one suddenly to apply to force, without knowing whether the other is disposed to do him justice, or to refuse it.

But in order perfectly to understand this article, it must be observed, that if in a litigious affair, our adversary refuses the means of bringing the right to proof, or artfully eludes it; if he does not, with good faith, apply to pacific measures for terminating the difference; and above all, if he is the first who begins acts of hostility, he renders the cause just which was before doubtful; we may then make use of reprisals, or seize his effects to oblige him to embrace the methods of reconciliation which the law of nature prescribes. This is the last attempt for coming to an open war.

We have observed above (§ 81), that the wealth of the citizens form a part of the total wealth of a nation; that between state and state, whatever is the property of the members, is considered as belonging to the body, and is answerable for the debts of the body (§ 82): whence it follows, that in reprisals, they seize the goods of the subject, in the same manner as those of the state, or the sovereign. Every thing that belongs to the nation is subject

§ 342.
Of reprisals.

§ 341.
What is required to render them lawful.

§ 344.
Upon what effects they are exercised.

to reprisals, as soon as it can be seized, provided it be not a deposit trusted to the public faith. This depositum is found in our hands, only in consequence of that confidence which the proprietor has put in our good faith; and it ought to be respected, even in case of open war. Thus, it is usual to behave in France, England, or elsewhere with respect to the money which foreigners have placed in the public funds.

§ 345.
The state
ought to re-
compence
those who
suffer by re-
prisals.

He who makes use of reprisals against a nation, on the goods of its members indiscriminately, cannot be taxed with seizing the wealth of an innocent person for the debt of another: for in this case the sovereign is to recompence those of his subjects on whom the reprisals fall; this is a debt of the state or nation of which each citizen ought only to support his quota.

§ 346.
The sove-
reign alone
can order
reprisals.

It is only between state and state, that all the wealth of the individuals is considered as belonging to the nation. Sovereigns transact their affairs between themselves, they carry on business with each other directly, and can only consider a foreign nation as a society of men who have only one common interest. It then belongs only to sovereigns to use and order reprisals on the footing we have just explained. Besides, this violent measure approaches very near to an open rupture, and is frequently followed by it. It is then of too great consequence to be abandoned to private persons. Thus we see that in all civilised states, a subject who thinks himself injured by a foreign nation, has recourse to his sovereign in order to obtain the permission of making reprisals. This is what is called desiring *letters of marque*.

§ 347.
How they
may take
place
against a
nation for
actions of
its subjects,
and in fa-
vour of the
injured
subjects.

We may use reprisals against a nation not only for the actions of the sovereign; but also for those of his subjects: and this takes place when the state, or the sovereign, has a share in the actions of his subjects, and takes it upon himself; which he may do several ways, as we have shewn in Chap. VI. of this Book.

In the same manner the sovereign demands justice, or makes reprisals not only for his own affairs; but also for those of his subjects whom he ought to protect, and whose cause is that of the nation.

§ 348.
But not in
favour of
foreigners.

But to grant reprisals against a nation in favour of foreigners, is to set himself up for a judge between that nation and these foreigners; which no sovereign has a right to do. The cause of reprisals ought to be just; it is even necessary that they should be founded on a denial of justice, which has already happened, or probably feared (§ 343). Now what right have we to judge, whether the complaint of a stranger against an independent state is just, if he has really been denied justice? If it be objected, that we may espouse the quarrel of another state in a war that appears to us to be just to give it succours, and even join with it; the case is different. In granting succours against a nation, we do not stop its effects, or its men, who are with us under the public faith, and in declaring war, we suffer it to withdraw its subjects and effects, as will be afterwards shewn

shewn. In the case of reprisals granted to our subjects, a nation cannot complain, that we violate the public faith in seizing its men or its effects; because we owe no security to these effects or to these men; but upon a just supposition that they will not first violate, with respect to us, or our subjects, the rules of justice, which nations ought to observe towards each other: if they violate them, we have a right to bring them to reason, and the way of reprisals is more easy, safe, and mild, than that of war. We cannot justify, by the same reasons, reprisals ordered in favour of foreigners. For the security we owe to the subjects of a foreign power does not depend, as a condition, on the security which that power should give to all other nations, to men who do not belong to us, and are not under our protection. England having in 1662 granted reprisals against the United Provinces, in favour of the knights of Malta, the states of Holland said, with reason, that, according to the law of nations, reprisals could only be granted to maintain the right of the subjects of the state, and not for an affair in which the nation had no concern*.

The private persons who by their actions have given room for just reprisals, are at least to recompence those on whom they fall, and the sovereign ought to constrain them to do it. For we are under an obligation to repair the damage we have occasioned by our own fault. And as the sovereign in refusing justice to the offended, has drawn reprisals upon his subjects, those who were the first cause of them do not become the less guilty; the fault of the sovereign does not exempt them from repairing the consequences of theirs. However, if they were ready to give satisfaction to him whom they had injured or offended, and their sovereign had hindered their doing it, they are only bound with respect to what they are obliged to do, to prevent reprisals, and the sovereign is to repair the surplus of damage, the consequence of his own fault (§ 345).

We have said (§ 343) that we ought not to make reprisals, till we are unable to obtain justice. Now justice is refused several ways: first, by a denial of justice properly so called, or by a refusal to hear your complaints, or those of your subjects, and by not admitting them to establish their rights before the ordinary tribunals. Secondly, by affected delays, for which no good reasons can be given; delays equivocal to a refusal, or still more ruinous. Thirdly, by a judgment manifestly unjust and partial. But it is necessary that this injustice should be evident and palpable. In all cases susceptible of doubt, a sovereign ought not to listen to the complaints of his subjects against a foreign tribunal, not to attempt to deliver them from the effects of a sentence passed in due form. This would be the means of exciting continual troubles. The law of nations prescribes to different states a reciprocal respect to the jurisdiction of each, from the same reasons, that the civil law

* See *Bynkershoek's Compétent Judge of Ambassadors*, Chap. XXII. § 5.

ordains

ordains, that in the state every definitive sentence, past in due form, shall be esteemed just. The obligation is neither so express, nor so extensive between nation and nation; but it cannot be denied, that it is highly suitable to their repose, and their duty with respect to human society, to oblige their subjects in all doubtful cases, and at least where there is a manifest injury, to submit to the sentences of the foreign tribunal, before which they have brought their affairs. (See above § 84).

§ 351.
Subjects
stopped by
way of re-
prisals.

As we may seize the things which belong to a nation, to oblige it to do justice, we may, for the same reason, arrest some of the citizens, and not release them till we have received intire satisfaction. This is what the Greeks called *Ἀνδροληψία*, the taking of men. At Athens the law permitted the relations of him who had been assassinated in a foreign country, to seize even three of the natives of that country, and to detain them till the murderer was punished, or delivered up *. But according to the manners of modern Europe, this method is seldom put in practice, except to obtain satisfaction for an injury of the same nature, that is, it is done to oblige a sovereign to release a person whom he detains unjustly.

Moreover, the subjects thus stopped being detained only as a security to oblige a nation to do justice, if their sovereign is obstinate in refusing it, we cannot take away their lives, nor inflict any corporal pain upon them, for a refusal of which they are not guilty. Their fortunes, their liberty itself, may be bound for the debts of the state; but not life, of which man has not the power of disposing. A sovereign has not the right to deprive those of life who are the subjects of him who has done him an injury, except when they are at war, and we shall see elsewhere, what it is that gives him this right.

§ 352.
The right
against
those who
oppose re-
prisals.

But the sovereign may make use of force against those who resist the execution of this right, and use as much as is necessary to surmount their unjust resistance. It is then permitted to repulse those who undertake to oppose the making just reprisals, and if it be necessary to go so far as even to deprive them of life, none can be accused of this misfortune; but their unjust and inconsiderate resistance. In such a case Grotius would have them rather abstain from making reprisals †. Among private persons, and for things that are not of extraordinary consequence, it is certainly worthy, not only of a Christian, but in general of every good-natured man, rather to abandon his right, than to kill him who makes an unjust resistance. But this is not the case with sovereigns. It would be of too great consequence for them to suffer themselves to be braved. The true and just welfare of the state is the grand rule: moderation is always laudable in itself; but the

* Demost. Orat. *Alu. Aristocrat.*

† *De Belli & Pacis, Lib. III. Cap. II. § 6.*

conductors of nations ought to make use of it only so far as it is consistent with the happiness and safety of their people.

After having shewn that it is permitted to make reprisals, when we can no otherwise obtain justice, it is easy to conclude from thence, that a sovereign has no right to oppose force, or to make war against him who, in such a case, by ordering the making of reprisals only exercises his just right.

And as the law of humanity prescribes to nations no less than to individuals, the mildest measures, when they are sufficient to obtain justice; whenever a sovereign can, by the way of reprisals, procure a just recompence, or a proper satisfaction, he ought to make use of this method, which is less violent, and less fatal than war. To this purpose I cannot avoid mentioning an error here, which is too general to be absolutely despised. If it happens that a prince having reason to complain of some injustice, or of some acts of hostility, and not finding his adversary disposed to give him satisfaction, determines to make use of reprisals, to endeavour to oblige him to listen to justice, before he comes to an open rupture; if he seizes his effects, his vessels, without declaration of war, and keeps them as pledges; you hear certain men cry out that this is robbery. If this prince had immediately declared war, they would not have said a word; they would perhaps have praised his conduct. Strange forgetfulness of reason, and of the just principles of humanity! Is not this saying, that nations ought to follow the laws of chivalry, to challenge each other to the lists, and to decide their quarrels like two braves, in a duel? Sovereigns ought to resolve to maintain the rights that belong to the state, and to endeavour to obtain justice by using lawful methods, and always preferring the mildest: once more, it is extremely evident, that the reprisals of which we are speaking, are means infinitely more mild and less fatal than war. But as they often lead to it, between powers whose forces are nearly equal, they ought not to engage in it till the last extremity. The prince then who attempts this method, instead of intirely coming to a rupture, is doubtless worthy of praise on account of his moderation and prudence.

Those who run to arms without necessity are the scourges of the human race, barbarians, enemies to society and rebels to the law of nature, or rather to the common Father of mankind.

There are cases, however, in which reprisals would be justly condemned, even when a declaration of war would not be so, and these are precisely those in which nations may with justice take up arms. When it relates to differences not on an act of violence, or of an injury received, but of a contested right; after having in vain attempted ways of reconciliation, or pacific measures of obtaining justice, it is a declaration of war which ought to follow, and not pretended reprisals, which in such a case would only be real acts of hostility, without a declaration of war, and would be
contrary

§ 353.
Just reprisals do not afford a just cause for war.

§ 354.
How we ought to confine ourselves to reprisals, or at length to enter into a war.

contrary to the public faith as well as to the mutual duties of nations. This will more evidently appear, when we shall have explained the reasons which establish the obligation of declaring war before acts of hostility are begun *.

But if from particular conjectures, and from the obstinacy of an unjust adversary, neither reprisals nor any of the methods of which we have been treating, are sufficient for our defence, and for the protection of our rights, there remains the unhappy and sad resource of war, which will be the subject of the following Book.

* See Book III. Chap. IV.

THE
L A W
OF
N A T I O N S.

B O O K III.

Of War

C H A P. I.

Of War, and its different Kind, together with the Right of making War.

“WAR is that state in which a nation prosecutes its right by force.” We also understand by this term, the act of war. § 1. Definition
itself, or the manner of prosecuting right by force: but it is common, and indeed more proper, in a treatise on the law of war, to understand this term in the sense we have given it.

Public war is that betwixt nations or sovereigns, and carried on in the name of the public power, and by its order. This is § 2. Of public war.
the war we are here to consider; *private war*, or that carried on between particulars, or private persons, properly belonging to the law of nature.

In treating of the law of safety, we have shewn that nature gives men a right to use force, when it is necessary for their defence, and the preservation of their rights. This principle is § 3. Of the right of making war.
generally acknowledged; reason demonstrates it, and nature herself has engraven it on the heart of man. Some fanatics indeed, taking literally the moderation recommended in the Gospel, have idly

idly suffered themselves to be murdered, or their houses pillaged, rather than oppose force to violence. But we need not be under any apprehensions that this error will make any great progress. Most men will naturally defend themselves and their possessions: happy if they were as well instructed to keep within the just limits which nature has prescribed to a right granted, only through necessity. To mark these just limits; to moderate by the rules of justice, equity and humanity, a right in itself melancholy, though too often necessary, is the intention of this third Book.

§ 4.
Belongs
only to the
sovereign
power.

As nature has given to men the right of using force, only when it becomes necessary for their defence, and the preservation of their rights (Book II. 49, &c.) the inference is manifest, that since the establishment of political societies, a right so dangerous in its exercise, no longer remains with private persons, except in those kind of rencounters, where society cannot protect or defend them.

In the bosom of society, public authority decides all the differences of the citizens, represses violence, and checks the insults of revenge. If a private person intends to prosecute his right against the subject of a foreign power, he may apply to the sovereign of his adversary, or to the magistrates invested with the public authority: and if he is denied justice by them, he is to have recourse to his proper sovereign, who is obliged to protect him. It would be too dangerous to give every citizen the liberty of doing himself justice against foreigners; as every individual of a nation might involve it in war. And how could peace be preserved between nations, if it was in the power of every man to disturb it? A right of so great moment, the right of judging whether a nation has a real cause of complaint; whether its case allows of using force, and having recourse to arms; whether prudence admits, and whether the welfare of the state demands it; this right, I say, can belong only to the body of the nation, or to the sovereign, its representative. It is doubtless one of these, without which there can be no salutary government, and are therefore called rights of majesty (Book I. § 45).

Thus the sovereign power has alone authority to make war. But as the different rights which constitute this power, originally resident in the body of the nation, may be separated or limited according to the will of the nation (Book I. § 31, 45). we are to seek the power of making war in the particular constitution of each state. The Kings of England, whose power is otherwise so limited, have the right of making war * and peace. Those of Sweden have lost it. Indeed the splendid, but destructive exploits of Charles XII. sufficiently warranted the states of the kingdom to reserve to themselves a right of such importance to their safety.

* I here speak of the right considered in itself; but as a king of England can neither raise money nor compel his subjects to take up arms, without the concurrence of the parliament, his right of making war is only a slender prerogative, unless the parliament second him with supplies.

War is either *defensive* or *offensive*. He who takes up arms to repel the attacks of an enemy, carries on a defensive war. He who first takes up arms, and attacks a nation that lived in peace with him, makes an offensive war. The object of a defensive war is merely simple; it is no other than self-defence: that of offensive war varies with the different affairs of the nation. But, in general, it relates either to the pursuit of some rights, or to safety. One nation attacks another either to obtain something it claims, revenge an injury received, prevent what its adversary is preparing to execute, or avert a danger with which it is menaced by the other. I do not here speak of the justice of war, that will make the subject of a particular chapter; all I here propose is to vindicate, in general, the several views and intentions for which a nation takes up arms; intentions which may furnish lawful reasons, or unjust pretences; but which are at least susceptible of a colour of right. I do not therefore place among the objects of offensive war, conquests or the desire of invading the property of another: such a latitude, destitute even of pretence, is not the object of a formal war, but that of a robbery, which we shall consider in its proper place.

§ 5.
Of war of-
fensive and
defensive.

C H A P. II.

*Of the Instruments of War, and of the raising of Troops, &c.
their Commanders or the Subaltern Powers in War.*

THE sovereign is the real author of war, which is carried on in his name, and by his order. The troops, officers, soldiers, and, in general, all by whom the sovereign makes war, are only instruments in his hands. They execute his will and not their own. The arms and all the apparatus of things used in war, are instruments of an inferior order. It is necessary with regard to questions that will occur in the sequel, to determine precisely what the particulars are belonging to war. Without entering here into any detail, whatever is particularly necessary in making war, is to be classed among the instruments of war; and things which are at all times of equal use, as provisions, belong to peace; unless it be in certain particular junctures, when those particulars appear to be absolutely designed for supporting the war. Arms of all kinds, artillery, gun-powder, salt-petre, and the other ingredients of which it is made, ladders, gabions, tools, and other implements of a siege; materials for building ships of war, tents, soldiers' clothes, &c. these always belong to war.

§ 6.
Of the in-
struments
of war.

As war cannot be carried on without soldiers, it is evident, that whoever has the right of making war, has also naturally that of raising troops. The latter then belongs likewise to the sovereign (§ 4). and is one of his prerogatives, (Book I. § 45). The power of raising troops, or composing an army, is of too

§ 7.
Of the
right of
levying
troops.

great consequence in a state to be entrusted to any other than the sovereign. The subaltern powers are not invested with it; they exercise it only by order or commission from the sovereign. But it is not always necessary that they should have an express order. On such urgent exigencies, when there is no waiting for the supreme order, the governor of a province, or the commandant of a place, may raise troops for the defence of the city or province committed to their care; and this they do by virtue of the power tacitly given them by their commission, in cases of this nature.

I say that this important power is the appendage of the sovereign; it makes a part of the supreme prerogative. But we have already seen, that those rights, the assemblage of which constitute the sovereign power, may be divided (Book I. § 31, 45), if the nation desire it. It may then happen that a nation does not confer on its head a right so dangerous to liberty as that of raising and supporting troops; or at least limits the execution, by making it depend on the consent of its representatives. The King of England, who has the right of making war, has also, indeed, that of granting commissions for raising troops; but he cannot compel any person to enlist, nor, without the concurrence of the parliament, keep an army on foot.

§ 8.
Obligations of the subjects.

Every member of a society is obliged to serve and defend the state as far as he is capable. Society cannot otherwise be maintained; and this concurrence for the common defence is one of the principal intentions of every political association. Every man capable of carrying arms, should take them up, at the first order of him who has the power of making war.

§ 9.
Of enlisting, or raising of troops.

In ancient times, especially in small states, every member, on a declaration of war, was a soldier; the whole community took up arms, and followed to the war. Soon after a choice was made, and armies formed of picked men, the remainder of the people pursuing their common occupations. At present the use of regular troops is almost every-where adopted, especially in powerful states. The public authority raises soldiers, distributes them into different bodies, under the command of generals and other officers, and keeps them on foot as long as it thinks necessary. As every citizen or subject is obliged to serve the state, the sovereign has a right, in case of necessity, to enlist whom he pleases. But he should choose only such as are proper for the occupation of war; and it is highly proper to take, as far as possible, only volunteers, who enlist cheerfully without compulsion.

§ 10.
Whether there are any exceptions from enlisting arms.

No person is naturally exempt from taking up arms in defence of the state; the obligation of every member of society being the same. They only are excepted who are incapable of handling arms, or supporting the fatigues of war. This is the reason why old men, children, and women are exempted. There are indeed women as brave and robust as men, but this is not usual; and rules must be general, and formed on what is most

most commonly seen. Besides, women are necessary for other services in society; and the mixture of both sexes in armies would be attended with too many inconveniences.

A good government should, as far as possible, employ all the citizens, distribute the posts and employments in such manner that the state may be the best secured in all its affairs. Therefore, when not compelled by necessity, it should exempt from military service all who are employed in stations useful or necessary to society. Magistrates are therefore usually excepted, their whole time not being too much for the administration of justice, and the maintenance of order.

The clergy cannot naturally, and by any right, arrogate to themselves a particular exemption. To defend one's country is an action not unworthy of the most sacred hands. The canon law, by prohibiting ecclesiastics from shedding human blood, is a convenient invention for shielding from danger those who are often so eager in kindling the flame of discord, and exciting bloody wars. Indeed the reasons alledged above in favour of the magistrates, plead also in behalf of that part of the clergy who are truly useful; those who teach religion govern the church, and celebrate the public worship*.

But those immense multitudes of useless religious, who, under pretence of dedicating themselves to God, in effect give themselves up to an effeminate idleness, by what right do they pretend to a prerogative pernicious to the state? And if the prince exempts them from military service, does he not injure the other members, on whom he thus throws the whole burden? I do not pretend to advise a prince to fill his armies with monks, but gradually to diminish a useless class of men, by taking from it injurious and ill-grounded privileges. History mentions a martial bishop †, whose weapon was a club, with which he knocked down the enemy, to avoid the irregularity of shedding their blood. It would be much more reasonable if, in order to exempt the religious from carrying arms, they were employed in laborious works for the relief of the soldiers. Many have, with zeal highly commend-

* Formerly bishops went to war in virtue of their fiefs, and carried with them their vassals. The Danish bishops were often very alert in a function which pleased them better than the tranquil care of their episcopal functions. The famous Absalon, bishop of Roschild, and afterwards archbishop of Lunden, was the principal general of king Valdemar I. And since the use of regular troops has put a period to this feudal service, there have not been wanting some martial prelates, who have affected to be seen at the head of armies. The cardinal de la Valette, and Sourdís archbishop of Bourdeaux, appeared in arms under the ministry of cardinal Richelieu, who also acted himself in a military capacity, at the attack of the pass of Sufa. This is an abuse which the church very justly opposes. A bishop makes a better appearance in his diocese than in the army, and, at present, sovereigns are in no want of generals and officers, who will perform their business more effectually than can be expected from churchmen. In short, let every person keep to his station. All I dispute with the clergy is an exemption of right, and in cases of necessity.

† A bishop of Beauvais, under Philip Augustus. He fought at the battle of Bouvines.

able, condescended to perform this task in cases of necessity. I could mention more than one famous siege, where the religious have done good service in defence of their country. When the Turks besieged Malta, the ecclesiastics, the women, the very children, all, according to their respective strength or station, contributed to that glorious defence, which baffled all the attempts of the Ottoman empire.

There is another class of idle persons, the exemption of whom is still more culpable, I mean that useless multitude of footmen, who fill the houses of the great and wealthy: a class who by their calling, corrupt themselves by displaying the luxury of their master.

§ 11.
Soldiers'
pay and
quarters.

Among the Romans, while all the people served alternately in war, their service was gratuitous; but when a choice is made, and standing armies are formed, the state is to pay them: no person owing more than his quota of the public service: and if the ordinary revenues are not sufficient, it must be provided for by imposts. It is just that they who do not serve should pay their defenders.

When the soldier is not in the field, there is a necessity of quartering him. This burden naturally falls on house-keepers; but as it is attended with many inconveniences to the people, it becomes a good prince, or a wise and equitable government, to ease them of it as far as possible. The King of France has taken care of this by building handsome and convenient barracks in many places for quartering the garrison.

§ 12.
Of hospitals
for invalids.

The asylums prepared for soldiers and reduced officers, who are grown old in the service, or whom fatigues or the enemy have rendered incapable of providing subsistence for themselves, may be considered as part of the military pay. The splendid structures, and the ample provision made in favour of invalids, both in France and England, do honour to the sovereign and the nation, which thus liberally discharge a sacred debt. The care of these unfortunate victims of war is the indispensable duty of every state, in proportion to its ability. It is contrary, not only to humanity, but to the strictest justice, that generous citizens, heroes, who have shed their blood for the safety of their country, should be left to perish with want, or unworthily forced to beg for a subsistence. The honourable maintenance of such persons might very properly be imposed upon rich convents, and large ecclesiastical benefices. Nothing can be more just than that those citizens who are exempted from all the dangers of war, should bestow part of their riches for the relief of their valiant defenders.

§ 13.
Of merce-
nary sol-
diers.

Mercenary soldiers are foreigners voluntarily engaging to serve the state for money, or a stipulated pay. As they owe no service to a sovereign, whose subjects they are not, the prospect of advantage is their sole motive. By enlisting they incur the obligation of serving him, and the prince on his part promises them conditions which are settled in the capitulation. This

capitulation being the rule and measure of the respective obligations

tions and rights of the contracting parties, is to be religiously observed. The complaints of the French historians against some Swiss troops; which, on several occasions, have formerly refused to march against the enemy, and have even withdrawn, because they were not paid; these complaints, I say, are equally ridiculous and unjust. Why is one of the parties more strongly bound by a capitulation than the other? if a prince fails of performing what he promised, foreign soldiers are discharged from any farther duty to him. I own it would be ungenerous to forsake a prince when, by an accident, and without any fault of his own, he should for a time be unable, or not in a condition to make good his payments; circumstances may happen when this inflexibility must be considered, if not strictly unjust, at least as very contrary to equity; but this was never the case of the Switzers. They never were known to abandon the service at the first muster after a failure of payment, and when they perceived the good intentions of a sovereign labouring under a real inability of satisfying them, their patience and zeal always supported them under such difficulties. Henry the IVth owed them immense sums; yet they did not, in his greatest necessities, abandon him: and that hero found the nation equally generous and brave. I here speak of the Switzers, because in reality they were often mere mercenaries. But we are not to confound with the troops of this kind the Switzers, who at present serve different powers, with the permission of their sovereign, and in virtue of alliances subsisting between those powers and the Helvetic body, or some particular Canton. The latter are real auxiliaries, though payed by the sovereigns whom they serve.

A great deal has been said on the question, whether the profession of a mercenary soldier be lawful, or not? or whether individuals may for money, or any other reward, engage to serve a foreign prince in his wars? This question does not to me appear very difficult to be solved. They who enter into such engagements, without the express or tacit consent of their sovereigns, offend against their duty as subjects. But if their sovereign leaves them at liberty to follow their inclination for a military life, they are absolutely free. Now, every free man may join himself to whatever society he pleases, and which to him appears most advantageous. He may make its cause his own, and espouse its quarrels. He becomes in some measure, at least for a time, a member of the state in the service in which he engages; and as an officer is commonly at liberty to quit the service when he thinks proper, and the soldier at the term of his engagement; if therefore this state embark in a war, manifestly unjust, the foreigners may quit its service. And this mercenary soldier, having now learnt the art of war, has rendered himself capable of serving his country, whenever it requires his assistance. The last consideration will furnish us with an answer to a question proposed on this head: whether the sovereign may with equity and decency permit his subjects to serve foreign powers indiscrimi-

nately for money? He may, because his subjects will by this means learn an art, the thorough knowledge of which is both useful and necessary. The tranquillity, the profound peace, which Switzerland has so long enjoyed, in the midst of all the commotions and wars which have agitated Europe; this long repose, I say, would soon become fatal to it, did not the citizens, by serving foreign princes, qualify themselves for the operations of war, and support their martial spirit.

§ 14.
What
should be
observed in
lifting such.

Mercenary soldiers engage themselves, and enlist voluntarily. The sovereign has no right to compel foreigners; he is not even to make use of artifice or surprize, for inducing them to engage in a contract, which, like all others, should be founded on candor and probity.

§ 15.
Of enlisting
in foreign
countries.

As the right of levying soldiers belongs solely to the nation (§ 7.) so no person is to enlist soldiers in a foreign country, without the permission of the sovereign, and even with this permission none but volunteers are to be enlisted; for the service of their country is out of the question here, and no sovereign has a right to give or sell his subjects to another. They who undertake to enlist soldiers in a foreign country, without the sovereign's permission; and, in general, whoever alienates the subjects of another, violates one of the most sacred rights both of the prince and the state. It is the crime distinguished by the name of *Plagiat*, or man-stealing, and accordingly is punished with the utmost severity in every politic state. Foreign recruiters are hanged immediately, and very justly, as it is not to be presumed that their sovereign ordered them to commit the crime; and if they did receive such an order, they ought not to obey it: their sovereign having no right to command what is contrary to the law of nature. It is not, I say, apprehended that these recruiters act by order of their sovereign, and usually they who have practised seduction only, are, if taken, severely punished. If they have used violence, and made their escape, they are claimed, and the men they carried off demanded. But if it appears that they acted by order, such a proceeding in a foreign sovereign is justly considered as an injury, and as a sufficient cause for declaring war against him, unless he condescends to make suitable reparation.

§ 16.
Obligation
of soldiers.

All soldiers, natives or foreigners, are to take an oath to act faithfully, and not desert the service. This is no more than what they are already obliged to, the one as subjects, the other by their engagement; but their fidelity is of so great importance to the state, that too many precautions cannot be taken for rendering it secure. Deserters should be severely punished, and the sovereign, where he judges it necessary, may inflict capital punishment on them. The emissaries who solicit them to desert are far more guilty than the recruiters mentioned in the preceding section.

§ 17.
Of military
laws.

Good order and subordination, so useful in all places, are no where so necessary as in an army. The sovereign should exactly

specify

pecify and determine the functions, duties, and rights of military persons, as soldiers, officers, commanders of parties, and generals. He should regulate and fix the authority of commanders of all degrees, the punishments to be inflicted on offences, the form of trials, &c. The laws and orders relative to these several particulars form the military code.

These regulations, the particular end of which is to maintain order in the troops, and to render them capable of performing the best service, constitute what is called military discipline. This is of the last importance. The Switzers were the first among the modern nations that revived it. It was a good discipline added to the bravery of a free people, that even in the infancy of the republic, produced those signal advantages which astonished all Europe. Machiavel, in his *Diskourfe on Livy*, says, *That the Switzers are the masters of all Europe in the art of war.* The Prussians have very lately shewn what may be expected from a good discipline, and assiduous exercise: soldiers, collected from all quarters have, by the force of custom, and the influence of command, performed all that could be expected from the most zealous and affectionate subjects.

§ 18.
Of military
discipline.

Every military officer, from the ensign to the general, enjoys the rights and authority assigned him by the sovereign; and the will of the sovereign in this respect is known by his declarations of the nature of their respective functions, as expressed either in their commissions he confers, or the military laws, where it is inferred by former examples. For every man enjoying a post is presumed to be invested with all the powers necessary for discharging properly the several functions of his office.

§ 19.
Of the sub-
altern
powers in
war.

Thus the commission of a commander in chief, taken simple and unlimited, gives him an absolute power over the army; the right of marching it whither he thinks proper, undertaking such operations as he shall find conducive to the service of the state, &c. His power indeed is often limited; but the example of Marshal Turenne sufficiently shews, that when the sovereign is well assured of having made a good choice, the best thing he can do in this respect is to give the general an unlimited power. Had the operations of the duke of Marlborough depended on the directions of the cabinet, there is little probability that all his campaigns would have been crowned with such distinguished success.

When a governor is besieged in the place where he commands, and all communication with his sovereign cut off, that very circumstance confers on him the whole authority of the state.

These particulars merit the utmost attention, as they furnish a principle for determining what the several commanders in war may execute with a sufficient power. Besides the consequences to be drawn from the very nature of the employments, and the general customs, must be also considered here. If it be known that the officers of a particular nation, in a certain rank, have been constantly invested with such or such powers, it may reasonably be

presumed

presumed that the person we are engaged with, is furnished with the same powers.

§ 20.
How their
promises
bind the
sovereign.

Whatever an inferior officer, as a commandant within his department, promises conformable to the terms of his commission, and agreeable to the power he is naturally invested with by his office, and the duties committed to his care, all this, I say, is, from the reasons we have before given, promised in the name and authority of the sovereign, he is as fully obliged to perform it as if he had immediately promised it in his own person. Thus a commandant capitulates for his place and for his garrison, and what he has promised the sovereign cannot invalidate. In the late war, the general who commanded the French at Lintz obliged himself to march back his troops on this side the Rhine. Governors of places have often promised that, for a limited time, their garrisons should not carry arms against the enemy with whom they capitulated: and these capitulations have always been faithfully observed.

§ 21.
In what
cases their
promises
bind only
themselves.

But if an inferior officer exceeds the authority of his post, his promise becomes no more than a private engagement. It is a *Sponsio* only, which we have already discussed (B. II. Ch. XIV.) This was the case of the Roman consuls at the Furcæ Caudinæ. They might agree to deliver hostages, and that their army should pass under the yoke, &c. but their power did not extend to their making peace, as they took care to signify to the Samnites.

§ 22.
Of a subal-
tern power
who as-
sumes an
authority
he has not.

If an inferior officer assumes an authority which he has not, and thus deceives the party treating with him, though an enemy, he is absolutely responsible for the damage caused by his deception, and obliged to make satisfaction: I say, were it an enemy, for the faith of treaties is to be observed between enemies, as all persons of virtue agree, and as we shall prove in the sequel. The sovereign of this fraudulent officer is to punish him, and oblige him to repair his fault. This is what the sovereign owes to justice and his own character.

§ 23.
How they
bind their
inferiors.

Subaltern officers, by their promises, bind those who are under their orders, with regard to all things within the limits of their posts, and whilst they have a right to command them; for with regard to such particulars, an officer acts by the authority of his sovereign, and which his inferiors are bound to respect. Thus in a capitulation the governor of a place stipulates and promises for his garrison, and also for the magistrates and inhabitants.

CHAP. III.

Of the just Causes of War.

§ 24.
That war is
never to be
undertaken
without
very strong
reasons.

WHOEVER forms to himself the idea of war, considers its terrible effects, its destructive and unhappy consequences, must agree, that it should never be undertaken without the strongest reasons. Humanity is shocked at a sovereign who without

without reason lavishes the lives of his most faithful subjects, who exposes his people to the havoc and miseries of war, when they might enjoy an honourable and salutary peace. And if this imprudence, this want of love for his people, be accompanied with injustice towards those he attacks, what guilt does he incur, or rather what a dreadful series of crimes does he commit? Besides the misfortunes drawn on his subjects, for which he is accountable, he is guilty also of those he carries amidst an innocent people. The slaughter of men, the pillage of cities, the devastation of provinces, are his crimes. He is responsible to God, and accountable to man, for every person that is killed. The violences, the crimes, the various disorders attendant on the licentious tumult of arms, pollute his conscience and blacken his account, as he is the original author of them all. May this faint sketch affect the hearts of the leaders of nations, and in military enterprizes suggest to them a circumspection proportional to the importance of the subject!

Were men always rational, they would terminate contests by the arms of reason only; natural justice and equity would be their rule or their judge. Force is but a wretched expedient against those who spurn at justice and refuse the remonstrances of reason; but this is the ultimate method to which a nation must have recourse, when every other proves ineffectual. It is only in extremities that a just and wise nation or a good prince has recourse to it, as we have shewn in the last chapter of the second Book. The reasons which may determine us to have recourse to it are of two kinds. The one manifest that we have a right to make war when we have a lawful cause for it. These are called *justificatory reasons*. The other taken from fitness and advantage. These shew whether it be expedient for the sovereign to undertake a war, and are called *motives*.

The right of using force or making war, belongs to nations no farther than is necessary to their defence, and the support of their rights (§ 3). Now any one attacking a nation, or violating its perfect rights, does it an injury: from which time, and only from thence, this nation has a right to repel him, and reduce the aggressor to reason. It has farther a right to prevent the injury on any appearance of it (Book II. § 50). Let us then say in general, that the foundation or cause of every just war is injury, either already done or threatened. The justificatory reasons of a war shew that an injury has been received, or so far threatened as to authorize a prevention of it by arms. It is however evident, that here the question regards the principal in the war, and not those who join in it as auxiliaries. Therefore, in judging whether a war be just, we must consider whether he who undertakes it, has in fact received an injury, or whether he be really threatened. And to know what is to be reputed an injury, the rights, properly called the *perfect rights* of the nation should be known; these are of many kinds, and in great number, but they may all be referred to the two general heads of which we

§ 25.
Of justificatory reasons and motives for making war.

§ 26.
What is in general a just cause of war.

have already treated: and shall consider farther in the course of this work. Whatever strikes at these rights is an injury, and a just cause of war.

§ 27.
What war
is unjust.

The immediate consequence of the premises is, that a nation taking arms when it has received no injury, nor is threatened with any, makes an unjust war. That nation to which an injury has been done, or is preparing to be done, has alone a just cause for making war.

§ 28.
Of the end
of war.

From the same principle we shall likewise infer the just and lawful scope of every war, which is, to *revenge or prevent injury*. To *revenge* signifies here to prosecute the reparation of an injury, if it be of a nature to be repaired; or if the evil be irreparable, to obtain a just satisfaction; or, if requisite, to punish the offender, with a view of providing for our future safety. To all this we are authorised by the right of safety. (Book II. § 49—52). Therefore we may set down this tripple end as the distinguishing characteristic of a lawful war. 1. To recover what belongs or is due to us. 2. To provide for our future safety by punishing the aggressor or offender. 3. To defend ourselves from an injury by repelling an unjust violence. The two first are the objects of an offensive, the third that of a defensive war. Camillus, when he was going to attack the Gauls, concisely represented to his soldiers all the causes which can justify a war: *Omnia quæ defendi, repetique et ulcisci fas sit* *.

§ 29.
Both justifi-
cative rea-
sons and de-
cent mo-
tives are to
concur in
undertak-
ing a war.

As nations or leaders are not only to make justice the rule of their conduct, but also to regulate it for the good of the state: so decent and commendable motives must concur with the justificative reasons, that they should undertake a war.

These reasons shew that a sovereign has a right to take up arms, that he has just cause for it. The proper motives shew that in the present case it is proper and expedient to make use of his right. These relate to prudence as the justificative reasons belong to justice.

§ 30.
Of decent
and faulty
motives.

I call decent and commendable motives those derived from the good of the state, from the safety and common advantage of the citizens. They are inseparable from the justificative reasons, a breach of justice being never truly advantageous. An unjust war may for a time enrich a nation, and enlarge its frontiers, but it thereby becomes odious to other nations, and is in danger of being oppressed by them. Besides, do opulence and extent of dominion always constitute the happiness of states? Amidst the multitude of instances which offer themselves here, I shall confine myself to the Romans. The Roman republic ruined itself by its triumphs, the excess of its conquests and power. Rome, the mistress of the world, when enslaved by tyrants, and oppressed by a military government, had reason to deplore the success of its arms, and to look back with regret on those happy times when

* Tit. Liv. Lib. IX. Cap. XLIX.

its power did not reach beyond Italy, or even when its dominion was almost confined within the circuit of its walls.

The unjust motives are all such as have no tendency to produce the good of the state, which, instead of being drawn from that pure source, are suggested by the violence of passions. Such are the arrogant desire of command, the ostentation of power, the thirst of riches, the avidity of conquest, hatred, and revenge.

The whole right of the nation, and consequently of the sovereign, proceeds from the good of the state, and by this rule it is to be measured. The obligation of promoting and maintaining the true good of the society, and of the state, gives the nation the right of taking up arms against him who threatens, or who attacks this valuable enjoyment. But if a nation, on an injury done it, is induced to take up arms, not by the necessity of procuring a just reparation, but by an unjust motive, it abuses its right. The injustice of the motive disgraces its quarrel, which otherwise had been just: war is not made for the primary lawful cause which the nation had to engage in it, that cause is now no more than the pretence. As to the sovereign in particular, the head of the nation, what right has he to expose the safety of the state, with the lives and fortunes of the citizens, to gratify his passions? The supreme power is committed to him, only for the good of the nation, and he is to exercise it for no other end; it is the limit prescribed to the very least of his measures, and shall he take the most important and the most dangerous from motives foreign or contrary to this great end! Yet nothing is more common than such a destructive inversion of views, and it is remarkable, that on this account, the judicious Polybius terms *Causes* * of the war, the motives on which it was undertaken, and *Pretences* † the justificative reasons alledged in defence of it. Thus, says he, the cause of the war of the Greeks against the Persians was the trial that had been made of their weakness, and Philip, or Alexander after him, took for pretences the desire of avenging injuries, which Greece had so often received, and of providing for its future safety.

Let us however have a better opinion of nations and their leaders; there are just causes of war, real justificative reasons; and why should there not be sovereigns who sincerely consider them as their warrant, when they have besides reasonable motives for taking up arms. We shall therefore call pretences the reasons alledged as justificative, and which have only the appearance of such, and are absolutely void even of the least foundation. The name of pretences may likewise be given to reasons true in themselves, but which not being of sufficient importance for undertaking a war, are made use of only to cover ambitious views, or some other faulty motive. Such was the complaint of the Czar Peter I. that at his passing through Riga, sufficient

§ 31.

Of war when the subject is lawful, and the motives faulty.

§ 32.

Of the pretences.

* *αἰτίαι*. Hist. Lib. III. Cap. VI.

† *παραπρεσβύς*.

honours had not been paid him. His other reason for declaring war against Sweden I shall here omit.

Pretences are at least a homage which unjust men pay to justice. He who covers himself with them shews still some remains of modesty. He does not openly trample on what is most sacred in human society; he tacitly acknowledges that a flagrant injustice deserves the indignation of all mankind.

§ 33.
Of war
undertaken
merely for
advantage.

Whoever undertakes a war, merely from motives of advantage, without justificative reasons, acts without any right, and his war is unjust. He who with just cause of taking arms shall yet begin a war only from views of interest, cannot indeed be charged with injustice, but he betrays vicious dispositions; his conduct is reprehensible and sullied by the badness of his motives. War is so dreadful a scourge that nothing less than manifest injustice, joined to a kind of necessity, can authorize it, render it commendable, or at least exempt us from blame and reproach.

§ 34.
Of nations
making
war with-
out reason
and appa-
rent mo-
tives.

Nations which are always ready to take arms on any prospect of advantage, are lawless robbers: but they who seem to delight in the ravages of war, who spread it on all sides, without any other motives than their ferocity, are monsters unworthy the name of men. They should be considered as the enemies of mankind, in the same manner as in civil society. Assassins and incendiaries by profession, are not only guilty in respect of the particular victims of their violences, but likewise of the state to which they are declared enemies. All nations have a right to join in punishing, suppressing, and even exterminating these savages. Such were the Germans, mentioned by Tacitus; such those barbarians who destroyed the Roman empire. Nor was it till a long time after their being converted to Christianity that this ferocity wore off: such have been the Turks and other Tartars, Genghisikan, Timur-Bec, or Tamerlane, who, like Attila, were scourges of Providence, and who made war only for the lust of making it. Such are in the polished ages, and among the most civilized nations those supposed heroes, whose supreme delight is a battle, and who make war from inclination purely, without any love to their country.

§ 35.
How the
defensive
war is just
or unjust.

A defensive war is just when made against an unjust aggressor. This requires no proofs. Self-defence against unjust violence is not only a right, but the duty of a nation, and one of its most sacred duties; but if an enemy making an offensive war has right on his side, force cannot justly be opposed to him, as the defence then becomes unjust. For the enemy makes use only of his right. He took up arms to procure himself a just satisfaction, which was denied him; and to resist a person in the using his right, is a piece of injustice.

§ 36.
How it
may be-
come just
against an
offensive

All that remains to be done in such a case is to offer the invader a just satisfaction. If he will not accept it, a nation gains this great advantage of having turned the balance of justice on its side, and his hostilities being rendered unjust, as having no longer

ger

ger any foundation, may very justly be opposed. The Samnites, war, which at first was just. instigated by the ambition of their chiefs, had ravaged the lands of the allies of Rome; when they became sensible of their misbehaviour, they offered full reparation for the damages, with every reasonable satisfaction; but all their submissions could not appease the Romans; on which Caius Pontius, general of the Samnites, said to his men, "Since the Romans are absolutely determined on the war, necessity justifies it on our side; arms become just and sacred to those who have no other resource." *Iustum est bellum, quibus necessarium; et pia arma, quibus nulla nisi in armis relinquitur spes* *.

For in order to estimate the justice of an offensive war, the nature of the subject for which a nation takes up arms must be first considered. A nation should be thoroughly assured of its right before it proceeds to assert it in so terrible a manner. If therefore the matter in dispute be evidently just, as the recovery of property, the use of asserting an incontestible right, and the obtaining a just satisfaction for a manifest injury, where justice cannot be obtained otherwise than by force of arms; an offensive war is lawful. Two things are therefore necessary to render it just, first, a right to be asserted; that is, that the demand made on another nation be important and well-grounded. 2. That this reasonable demand cannot be obtained otherwise than by force of arms. Necessity alone warrants the use of force. It is a dangerous and terrible resource. Nature, the common parent of mankind, allows of it only in extremity, and when all others fail. It is doing wrong to a nation to make use of violence against it, before we know whether it be disposed to do us justice, or to refuse it.

They who without trying pacific measures, on the least motive run to arms, sufficiently shew that justificative reasons, in their mouths, are only pretences; they eagerly seize the opportunity of indulging their passions, and of gratifying their ambition, under some colour of right.

In a doubtful cause, when the rights are uncertain, obscure, and litigious, all that can be reasonably required is, that the question be discussed. (Book II. § 331). And if it be impossible fully to clear it up, let the contest be terminated by an equitable treaty. If one of the parties should reject these pacific measures of accommodation, the other is empowered to take up arms for reducing him to an agreement. And we must observe, that war does not decide the question; victory only compels the vanquished to subscribe to a treaty for terminating the difference. It is an error no less absurd than pernicious, to say, that war is to decide controversies between those who, as is the case of nations, acknowledge no judge. It is force and prudence, rather than right, which victory usually declares for. It would be a bad rule of decision, but it is an effectual way of compelling him who resists the forms of justice; and it becomes just in the

§ 37.
How an
offensive
war is just
in an evi-
dent cause.

§ 38.
In a doubt-
ful cause.

* Tit. Liv. Lib. XI. init.

hands of a prince who uses it seasonably, with discretion, and for a lawful cause.

§ 39.
War cannot be just on both sides.

War cannot be just on both sides; one claims a right, the other disputes it; one complains of a wrong, the other denies any injury to be done. They are two persons disputing on the truth of a proposition, and it is impossible that two contrary sentiments should be true at the same time.

§ 40.
Sometimes reputed lawful.

It may however happen, that both the contending parties act with candor, and in a doubtful cause, it is still uncertain which side is in the right. Nations then being equal and independent, (Book II. § 36. and Prelim. § 18, 19), so as not to claim a right of judgment over each other; it follows, that in every case susceptible of doubt, the arms of the two parties at war are to be accounted equally lawful, at least as to external effects, and till the decision of the cause. This does not hinder other nations from judging it for themselves, for knowing what they have to do, and assisting that nation which shall appear to have right on its side; neither does this effect of the independency of the nations disculpate the author of an unjust war. But if he acts on the consequence of an invincible ignorance or error, the injustice of his arms is not to be imputed to him.

§ 41.
A war undertaken to punish a nation.

When an offensive war has for its object the punishment of a nation, like every other war, it is to be founded on right and necessity. 1. On right; an injury must have been actually received. Injury alone being a just cause of war (§ 26); the reparation of it may be lawfully prosecuted, or if by its nature it be irreparable, which is the case when punishment is to be admitted, a nation is authorized to provide for its own safety, and even for that of all other nations, by inflicting on the offender a penalty capable of correcting him, and serving as an example. 2. Necessity is to justify a war of this kind; I mean, that to be lawful, it must be the only way left for obtaining a just satisfaction, which implies a reasonable security for the time to come. If this complete satisfaction be offered, or if it may be obtained without a war, the injury is obliterated, and the right of surety no longer authorizes the prosecution of revenge (Book II. § 49, 52). The nation in fault is to submit to a penalty which it has deserved, and suffer it by way of satisfaction, yet no way obliged to give itself up to the discretion of an incensed enemy. Therefore, when attacked, it is to make a tender of satisfaction, ask what penalty is required, and if no explicit answer be given, or the enemy is for imposing a disproportionate penalty, it then acquires a right of resisting, and defence becomes lawful. It is also manifest that the party offended has alone a right of punishing independent persons: we shall not here repeat what we have said elsewhere (Book II. § 7), of the dangerous error, or extravagant pretence of those who assume a right of punishing an independent nation for faults which do not concern them; who extravagantly setting up for defenders of the cause of God, take on themselves to punish the depravation

depravation of manners, or the irreligion of a people, not committed to their superintendency.

Here a very celebrated question, and of the highest importance, offers itself. It is asked, whether the aggrandizement of a neighbouring power by which a nation fears it may one day be oppressed, be a sufficient reason for making war against it? Whether justice allows of taking arms for opposing its aggrandizement, or for weakening it, only with a view of securing ourselves from those dangers, which the weak have generally too much cause to dread from an overgrown power. To the majority of politicians this question is no problem; it is more intricate and perplexing to those who to prudence would constantly unite justice.

§ 42.
Whether the aggrandizement of a neighbouring power can authorize a war against him.

On one hand a state which increases its power by all the methods of good government, does no more than what is commendable; it fulfils its duties towards itself, without any offending against those due to others. The sovereign, who by inheritance, by a free choice, or some other just and decent way, joins new provinces, and entire kingdoms, to his dominions, only makes use of his right, without injuring others. How then should it be lawful to attack a state which for its aggrandizement makes use of lawful means. Nothing less than an injury, or being manifestly threatened with it, can be a just subject for war (§ 26, 27). On the other hand, an unhappy but constant experience, too much shews that superior powers seldom fail of molesting their neighbours, of oppressing them, and when an opportunity offers, and they can do it with impunity, they seldom stick at totally subduing them. Europe was on the point of falling into servitude for want of a timely opposition to the growing fortune of Charles V. Is the danger to be waited for? Is the storm, which might be dispersed at its rising, to be permitted to increase? Are we to allow of the aggrandizement of a neighbour, and quietly wait till he is disposed to enslave us? Will it be a time for defending ourselves when we are deprived of the means? Prudence is a duty belonging to all men, and very particularly to the heads of nations, as charged with the safety of a whole people. Let us endeavour to solve this momentous question, agreeably to the sacred principle of the law of nature and nations. It will be seen that they do not lead to weak samples, and that it is an invariable truth, that justice is inseparable from some policy.

And first, let us observe that prudence, which is a necessary quality for sovereigns, will never advise the use of unlawful means towards a just and praise-worthy end. Let not the safety of the people, that supreme law of the state, be objected here; for this very safety of the people, the common safety of nations, interdicts the use of means contrary to justice and probity. Why are certain means unlawful? If we closely consider the point, if we trace it to its first principles, we shall see that it is purely because the introduction of them would be pernicious

§ 43.
Alone, and of itself, it cannot give a right.

to

to human society, and of ill consequence to all nations. See particularly what we have said concerning justice (Book II. Ch. V.). It is therefore for the interest and even safety of nations, to account it a sacred maxim, that the end does not legitimate the means. And war being allowable only to revenge an injury received, or to avert an impending danger, (§ 26.), it is a sacred principle of the law of nations, that an increase of power does not alone and of itself give any one a right to take arms for opposing it.

§ 44.
Here the
appear-
ances of
danger
give this
right.

No injury has been received from this power. This the question supposes, therefore to authorize a nation's running to arms, it must have very solid grounds to believe that itself is threatened. Now power alone does not threaten an injury: there must be likewise the will. It is very unhappy for mankind that the will of oppressing may be almost always supposed, where there is a power of oppressing with impunity. But these two things are not absolutely inseparable: and all the right which their ordinary or frequent union gives, is to take the first appearances for a sufficient indication. Whenever a state has given signs of injustice, rapacity, pride, ambition, or of an imperious thirst of rule; it becomes a suspicious neighbour to be guarded against: and at a juncture when it is on the point of receiving a formidable augmentation of power, securities may be asked, and on its making any difficulty to give them, its designs may be prevented by force of arms. The interests of nations are of a very different importance from those of individuals: the sovereign is not to be indolent or lazy in the care of them, or from nobleness of mind and generosity to wave his suspicions. The whole of a nation lies at stake when it has a neighbour powerful and ambitious. As men are under a necessity of regulating themselves generally by probabilities, these probabilities claim their attention in proportion to the importance of the subject; and, to make use of a geometrical expression, their right of obviating a danger is in a compound ratio of the degree of appearance, and of the greatness of the evil threatened. If the question be of an evil easily supportable, of a slender loss, matters are not to be hurried; there is no great danger in delaying our opposition to it, till there is a certainty of our being threatened. But if the safety of the state lies at stake, we cannot exceed in precaution and fore-sight. Are we to delay the averting of our ruin till it is become inevitable? If the appearances are so easily credited, it is the fault of their neighbour, who has betrayed his ambition by several indications. If Charles the second, king of Spain, instead of settling the succession on the duke of Anjou, had appointed for his heir Lewis XIV. himself; to have inactively suffered the union of the monarchy of Spain with that of France, would, according to all the rules of human foresight, have been nothing less than to deliver up all Europe to servitude, or at least to bring it into the most critical and precarious situation. But how? if two in-

one

one joint empire, have they not a right to it? What just opposition can be offered against it? I answer, they have a right to such an union, provided it be not with views detrimental to others. Now, if each of these nations be abstractly able to govern, support, and defend itself against insult and oppression, it is to be reasonably presumed that the intention of their coalescence is to give law to their neighbours. And on occasion, where it is impossible, or too dangerous to wait for an absolute certainty, we may justly act on a reasonable presumption. If a stranger presents his piece at me in a wood, I am not yet certain that he intends to kill me; but shall I, in order to be convinced of his design, allow him time to fire? What reasonable casuist will deny me a right of preventing him? But presumption becomes nearly equal to a certainty, if the prince, who is on the point of rising to an enormous power, has already manifested an unlimited pride and insatiable ambition. In the preceding supposition, who could have advised the powers of Europe to suffer such a formidable augmentation of the great power of Lewis XIV.? Too certain of the use he would have made of it, they would have joined in opposing it, and in this their safety warranted them. To say that they should have allowed him time to settle his dominion over Spain, to consolidate the union of the two monarchies, and, to avoid doing him wrong, they should have peaceably waited till he oppressed them; is not this depriving men of the right of governing themselves by the rules of prudence, of following probability? Would it not be to preclude from them the liberty of providing for their safety, because they have not a mathematical demonstration of its being in danger? It would have been in vain to preach such a doctrine. The principal sovereigns of Europe, habituated by the administration of Louvois, to dread the views and power of Louis XIV. carried their suspicions so far, that they would not suffer a prince of the house of France to sit on the throne of Spain, though he had been invited to it by the nation, conformably to the will of its last sovereign. However he ascended it, notwithstanding the efforts of all those who were so very much afraid of his elevation, and it has since appeared that their policy was too suspicious.

It is still easier to prove, that should this formidable power betray any unjust and ambitious dispositions by doing the least injustice to another, every nation may avail themselves of the occasion, and join their forces to those of the party injured, in order to reduce that ambitious power, and disable it from so easily oppressing its neighbours, or keeping them in continual awe and fear. For an injury gives a nation a right to provide for its future safety, by taking away from the violator the means of oppression. It is lawful and even praise-worthy to assist those who are oppressed, or unjustly attacked.

This, I hope, will silence the politicians, and leave them no just cause to fear that the exact observance of justice leads to insult and slavery. Perhaps there is not an instance of a state's receiving any remarkable increment of power, without giving others just cause

\$ 45.
Another
case more
evident.

of

of complaint. If all the nations interested are watchful and alert in opposing it, they will have nothing to fear. The emperor Charles V. in order to reduce the princes of the empire under his authority, laid hold of the pretence of religion, and if, by making a right use of his victory over the elector of Saxony, he had accomplished this vast design, the liberties of Europe would have been endangered. It was therefore with very good reason, that France assisted the protestants of Germany, for, besides the calls of its own safety, justice warranted the procedure. When the same prince seized on the duchy of Milan, it became the powers of Europe to assist France in disputing it with him, and to take advantage of the opportunity for curtailings his power. Had they prudently availed themselves of the just causes, which he soon gave them to form a league against him, it would have saved themselves the subsequent anxieties for their tottering liberty.

§ 46.
Other allowable
means of
defence
against a
formidable
power.

But supposing that this powerful state observes an unexceptionable justice and circumspection, are its progresses to be looked on with an eye of indifference? And shall the nations, as tranquil spectators of the rapid augmentations of its power, imprudently give themselves up to such designs as incidents may inspire? Doubtless no. In a matter of so great importance, supineness would be unpardonable. The example of the Romans is a good lesson for all princes. Had the most powerful states of these times confederated together for keeping a watchful eye on the enterprizes of Rome, and checking its incroachments, they would not successively have fallen into servitude. But force of arms is not the only expedient by which we may guard against a formidable power. There are others more mild and tranquil, such as are always lawful: the most effectual is a confederacy of other sovereigns less powerful, the junction of whose forces is a balance against the power which gives them umbrage. If they are firm and faithful in their alliance, their union will prove the safety of each.

They may also mutually favour each other, exclusively of him whom they fear, and by allowing various advantages to the subjects of allies, especially in trade, and denying them to those of that dangerous power, they will augment their own strength, and diminish that of the latter, without its having any cause of complaint; every one being at liberty to dispose of their favours and indulgencies.

§ 47.
Of political
equilibrium.

Europe forms a political system, a body, where the whole is connected by the relations and different interests of nations inhabiting this part of the world. It is not as anciently, a confused heap of detached pieces, each of which thought itself very little concerned in the fate of others, and seldom regarded things which did not immediately relate to it. The continual attention of sovereigns to what is on the carpet, the constant residence of ministers, and the perpetual negotiations, make Europe a kind of a republic, the members of which, though independent, unite, through the ties of common interest, for the maintenance of order and liberty.

liberty. Hence arose that famous scheme of the political equilibrium or balance of power ; by which is understood such a disposition of things as no power is able absolutely to predominate, or to prescribe laws to others.

The surest means for conserving this equilibrium would be, that no power should be much superior to the others ; that all, or at least the greater part, should be nearly equal in force. This project is attributed to Henry IV. but there was no executing it without injustice and violence. Besides, had equality been established, how could it always be supported by lawful means ? Commerce, industry, military virtues, would soon put an end to it. The right of inheriting sovereignties, even in favour of women and their descendants, so absurdly settled, yet if settled, would overthrow this system. It is more natural, easy, and just, to have recourse to the means just mentioned, of forming confederacies for making head against the most powerful, and hindering him from dictating law.

This is now observed by the sovereigns of Europe. They consider the two principal powers, which on that very account are naturally rivals, as destined to be checks on each other, and unite with the weakest, like so many weights thrown into the lightest scale, for keeping one in equilibrium with the other. The house of Austria has long been the preponderating power, and at present France is so in her turn. England, the opulence and fleets of which have a very great influence, without alarming any state with regard to its liberty, because this power seems cured of the spirit of conquest : England, I say, has the glory of holding this political balance. It is watchful to keep it in equilibrium, which is really a very just and wise policy, and will ever be highly valuable, whilst the means it makes use of are only alliances, confederacies, and others equally lawful.

Confederacies would be a sure way of preserving the equilibrium, and supporting the liberty of nations, did all princes thoroughly understand their true interests, and regulate all their steps for the good of the state. But great powers are too successful in gaining over partizans and allies, who blindly surrender themselves to their views. Dazzled by the lustre of a present advantage, seduced by their avarice, deceived by wicked ministers, how many princes become the tools of a power, which one day may swallow up either themselves or their successors ! Thus the safest way, when a favourable opportunity offers, and it can be done with justice, is to weaken him who infringes upon the equilibrium, and by every honest method hinder his acquiring too formidable a degree of power. For this purpose, the interested nations should be especially attentive not to suffer him to aggrandize himself by arms, and this they may always do with justice. For if this prince makes an unjust war, every one has a right to succour the oppressed. If he makes a just war, neutral nations may interfere as mediators for an accommodation ; induce the weaker side to offer a just satisfaction with reasonable terms, and not permit it to

§ 48. :
Ways of
maintain-
ing it.

§ 49.
How he
who breaks
the equi-
librium may
be restrained,
or even
weakened.

fall under the weight of the conqueror. On the offer of equitable conditions to the prince who makes even the most just war, he has all that he can demand. The justice of his cause, as we shall soon see, never gives him a right of absolutely subduing his enemy, unless when this extremity becomes necessary to his safety, or in the want of any other means of indemnifying him for the injury he has received. Now, this is not the case here, as the interpoling nations can in another manner procure him a just satisfaction, and assurance of safety.

In fine, should this formidable power plainly entertain designs of oppression and conquest, should it betray its views by preparatives or other motions, the neighbouring nations have an unquestionable right to prevent it. And if the fate of war declares on their side, a farther right to make use of this happy opportunity for weakening and reducing a power too contrary to the equilibrium, and dangerous to the common liberty.

This right of nations is still more evident against a sovereign, who from a precipitate order of running to arms without reasons, or even so much as plausible pretences, is continually disturbing the public tranquillity.

§ 30.
Behaviour
allowable
towards a
neighbour
preparing
for war.

This leads us to a particular question nearly allied to the former. When a neighbour in the midst of a profound peace builds fortresses on our frontier, equips a fleet, augments his troops, assembles a powerful army, fills his magazines; in a word, when he makes preparations for war; are we allowed to attack him for preventing the danger with which we really think ourselves threatened? The answer greatly depends on the manners and temper of this neighbour. The reasons of these preparations must be asked; and he obliged to explain himself. This is the way of proceeding in Europe; and if his sincerity and good faith be justly suspected, securities may be required of him; and his refusal would be a sufficient indication of ill designs, and a just reason for preventing them; but if this sovereign has never given any signs of baseness and perfidy, and especially if at that time there is no dispute subsisting between him and us, why should we not quietly rest on his word, only taking the precaution, which prudence renders indispensable? We are not without reason to think him capable of bringing such infamy on himself, as to add perfidy to violence. Whilst he has not rendered his faith suspicious, we have no right to require any other security from him.

However, if a sovereign continues to keep up an extraordinary force in profound peace, his neighbours cannot entirely rely on his word: prudence requires that they should keep themselves on their guard; and however certain they may be of the good faith of a prince, unforeseen differences may intervene; and shall they leave him the advantage of being provided at that juncture with a numerous and well-disciplined army, while they themselves can have only new levies to oppose it? Unquestionably, no. This would be almost to give themselves up to his discretion. They are then under the necessity of following his example, and main-
taining

taining a large army; and what a burthen is this to a state? Formerly, and without going any farther back than the last century, it was a general article in treaties of peace, that all parties should disband their troops. If in full peace a prince was for maintaining any considerable number of forces, his neighbours concerted measures, formed leagues against him, and obliged him to desist from his military proceedings, and reduce his forces to the numbers stipulated. A most salutary custom, though for some time past unhappily fallen into neglect. The keeping up of numerous armies at all times is destructive of agriculture, puts a stop to population, and must necessarily destroy the liberty of those people by whom they are maintained. Happy England! whose situation exempts it from any considerable charge in keeping of the instruments of despotism. Happy Switzerland! while by continuing carefully to exercise the militia, it keeps itself in a condition to repel any foreign enemies, and does not maintain in idleness, soldiers who may one day overthrow the public liberty, and even bid defiance to the lawful authority of the sovereign. Of this the Roman legions were a signal instance. This happy method of a free republic, the custom of training up all the citizens to the art of war, renders the state respectable abroad, and saves it from a very pernicious defect at home. It would not have failed of being everywhere imitated, had the public good been every-where the only view. Thus have we laid down the general principles for estimating the justice of a war. They who are thoroughly acquainted with the principles, and have just ideas of the rights of nations, will easily apply the rules to particular cases.

C H A P. IV.

Of the Declaration of War, and of War in Form.

THE right of making war belongs to nations only as a remedy §. 1.
 against injustice: it arises from an unhappy necessity. This Declaration
 remedy is so dreadful in its effects, so destructive to mankind, of war.
 so full of trouble to the state making use of it, that unquestionably the law of nature allows of it only at the utmost necessity
 extremity; that is, when it appears that justice cannot take place by thereof.
 any other expedient. It is demonstrated in the foregoing chapter, that, to take arms lawfully, 1. That we have just cause of complaint. 2. That a reasonable satisfaction has been denied us. 3. When the head of a nation, as we have observed, has maturely considered whether it be for the good of the state to prosecute his right by force of arms. But these are not sufficient; as it is possible that the present fear of our arms may make an impression on the mind of an adversary, and induce him to do us justice. We owe this farther regard to humanity, and especially to the lives and tranquillity of the subjects, to declare to this unjust nation, or its chief, that we at length are going to have recourse to the last remedy,
 U 2

medy, and make use of open force, for bringing him to reason. This is called *declaring war*. All this is included in the Roman manner of proceeding, regulated in their *Fecial* law. They first sent the chief of the *Feciales*, or heralds, called *Pater Patratus*, to demand satisfaction of the people which had offended them; and if within the space of thirty-three days this people did not return a satisfactory answer, the herald called the gods to be witnesses of the wrong, and came away saying, that the Romans would consider what they had to do. The king, and afterwards the consul, used to ask the senate's opinion; and the war being resolved on, the herald was sent back to the frontier, where he declared it *. It is surprising to find among the Romans such justice, such moderation and wisdom, at a time too when apparently nothing but courage and ferocity was to be expected from them. By this religious conduct, previous to its war, Rome laid the most solid foundation for its greatness.

§ 52.
What it is
to contain.

A declaration of war being necessary, as a farther trial for terminating the difference without the effusion of blood, by making use of the principle fear, for bringing an enemy to more equitable sentiments; it is, at the same time that it declares the resolution taken of making war, to set forth the cause of that resolution. This is at present the constant practice among the powers of Europe.

§ 53.
It is single
or condi-
tional.

After a fruitless application for justice, a nation may proceed to a declaration of war, which is then *pure* and *simple*. But if it be thought proper to avoid making it at two several times, the demand of satisfaction, which the Romans call *rerum repetitio*, may be accompanied by a *conditional declaration* of war, notifying, that if justice be not done without delay, an immediate war will be the consequence; and then there is no need of a *pure* and *simple* declaration of war, the *conditional* sufficing, if the enemy delays giving satisfaction.

§ 54.
This right
of war
ceases by
the offer of
equitable
conditions.

If the enemy on either declaration offers equitable conditions of peace, the war is to be suspended; for whenever justice is done, all right of employing force is superseded; the use being permitted only for the necessary support of right. To these offers, however, are to be added securities; for we are under no obligation to suffer ourselves to be amused by empty proposals. The word of a sovereign is a sufficient security, whilst he has not disgraced his credit by an act of perfidy. And we should be contented with it. As to the conditions in themselves, besides the essential subject, a reimbursement of the expences may likewise be demanded in regard to the preparatives.

§ 55.
Formalities
of a decla-
ration of
war.

The declaration of war must be made known to the state against whom it is made. This is all which the natural law of nations requires; yet custom having introduced some formalities, those nations which by adopting the custom have given a tacit consent to the formalities, are under an obligation of observing

* Tit. Liv. Lib. I. Cap. XXXI.

them, till they have publicly renounced them. (Prelim. § 26.) Formerly the powers of Europe used to send heralds or ambassadors to declare war; at present this is only done in the capital, the principal towns, or on the frontiers. Manifestos are issued, and the communication so easy and expeditious since the establishment of posts, soon spreads the intelligence.

Besides the foregoing reasons, it is necessary for a nation to publish the declaration of war for the instruction and direction of its own subjects, in order to fix the date of the rights belonging to them from the moment of this declaration, and relatively to certain effects which the voluntary law of nations attributes to a war in form. Without such a public declaration of war, it would

be difficult to settle, in a treaty of peace, those acts which are to be accounted the effects of the war, and those which each nation may consider as wrongs, for obtaining reparation. In the last treaty of Aix la Chapelle, between France and Spain on one side, and England on the other, it was agreed, that all the prizes taken before the declaration of war should be restored.

He who is attacked and makes only a defensive war, need not declare it, the state of war being sufficiently determined by the declaration of the enemy, or his open hostilities. Yet, whether from dignity, or for the direction of his subjects, a sovereign, though attacked at present, seldom fails of declaring war in his turn.

If a nation against whom a war has been resolved on, will not admit any minister or herald to declare it, whatever the custom otherwise be, it is sufficient for the other nation to declare it within its own territories, or on the frontier; and if the declaration does not come to its knowledge before hostilities are commenced, the former can only blame itself. The Turks confine and even abuse the very ambassadors of the powers with whom they are determined to break; a herald going to declare war against them in their own country, would run the hazard of his life. Their savageness dispenses with this formality.

But no person being exempted from his duty, only because another has been wanting in *his*, we are not to omit declaring war against a nation before beginning hostilities, because this nation had on another occasion attacked us without any declaration. That nation in so doing has violated the law of nature (Sect. 51.) and its fault is no warrant for us to be guilty of the like.

The law of nations does not impose the obligation of declaring war, for giving the enemy time to prepare itself for an unjust defence. The declaration need not be made till the army has reached the frontiers; it is even lawful to delay it till we have entered the enemies territories, and occupied an advantageous station; yet it must always precede the commission of any hostility. For thus we provide for our own safety, and equally procure the end of the declaration of war, which is, that an unjust adversary may still seriously consider his measures, and avoid the horrors of war, by doing justice. This was the conduct of that

generous prince Henry IV. towards Charles Emanuel Duke of Savoy, who had wearied his patience by vain and fraudulent negotiations (*).

§ 61.
Duty of the
inhabitants
on a foreign
army's enter-
ing a
country be-
fore a de-
claration of
war.

If he who enters a country with an army kept in strict discipline, declares to the inhabitants, that he does not come as an enemy, that he will commit no violence, and will acquaint the sovereign with the cause of his coming, the inhabitants are not to attack him; and should they offer at any such thing, he has a right to chastise them. But he is not to be admitted into any fortresses, nor can he properly demand entrance. It is not the business of subjects to begin hostilities without the sovereign's orders; but, if brave and loyal, they will in the mean time seize on all the advantageous posts, and defend themselves against any attempt made to dislodge them.

§ 62.
Beginning
of hostili-
ties.

The sovereign, thus entered a country, having declared war, if equitable conditions are not offered him without delay, he may proceed to operations; for, I repeat it, we are under no obligation of suffering ourselves to be amused. But, at the same time, we are never to lose sight of the principles before laid down (§ 26. § 1.) concerning the only legitimate causes of war. To march an army into a neighbouring country, without any menace on its part, without having tried to obtain, by reason and justice, an equitable reparation for wrongs pretended to have been received, would be introducing a very destructive method, shocking to humanity; it would be at once to overthrow the foundations of the safety and tranquillity of states. If this manner of proceeding be not exploded and proscribed by the public indignation and the concurrence of civilized nations, nothing is left but to be always in a military posture, and to keep ourselves on our guard, no less in the time of a profound peace than of a declared war.

§ 63.
Behaviour
towards
subjects of
an enemy
in a coun-
try at the
time of the
declaration
of war.

The sovereign declaring war can neither detain those subjects of the enemy who are within his dominions at the time of the declaration, nor their effects. They came into his country on the public faith. By permitting them to enter his territories, and continue there, he tacitly promised them liberty and security for their return. He is therefore to allow them a reasonable time for withdrawing with their effects, and if they stay beyond the term prescribed, he has a right to treat them as enemies; though as enemies disarmed. But if they are detained by an insurmountable impediment, as by sickness, then of necessity and for the same reasons, a longer time is to be granted them: at present, so far from being wanting in his duty, humanity is still carried farther, and very often the subjects of a state against which war is declared, are allowed all the time for settling their affairs that can in reason be required. This is observed in a particular manner with regard to mercantile persons, and care is taken to make

provision for this branch, in treaties of commerce. The King of England has done more than this. His last declaration of war against France has these remarkable words :

“ And whereas there are remaining in our kingdom divers of the subjects of the French King, we do hereby declare our royal intention to be, that all the French subjects who shall demean themselves dutifully towards us, shall be safe in their persons and effects.”

We have said (§ 56.) that a sovereign is to make the declaration of the war public within his dominions, for the instruction and direction of his subjects. He is also to make known his declaration of war to the neutral powers, for acquainting them with the justificative reasons which warrant him, and the cause which obliges him to take arms, and for notifying to them that such or such a people is his enemy, that they may conduct themselves conformable to his advice. We shall even see that this is necessary to obviate all difficulty, when we come to treat of the right of seizing certain things, which neutral persons are carrying to the enemy, and what in time of war is called *contraband*. This publication of the war may be called *declaration*, and that which is notified directly to the enemy, *denunciation*; and indeed the Latin term is *denunciatio belli*. War is at present published and declared by manifestos. These pieces never fail of containing the justificative reasons, good or bad, for proceeding to the extremity of taking up arms. The least scrupulous sovereign would be thought just, equitable, and a lover of peace; he is sensible that a contrary reputation might be detrimental to him. The manifesto implying a declaration of war, or the declaration itself which is published all over the state, contains also the general orders to his subjects relative to their conduct in the war.

§ 64.
Publication
of the war,
and mani-
festos.

In so civilized an age, it may be unnecessary to observe, that in these pieces, published on account of a war, all opprobrious words are to be avoided, together with every expression indicating hatred, animosity, and rage; as these can only excite the like sentiments in the enemy. A prince, both in his discourse and in his writings, is to observe the most noble decency. He is to respect himself in the person of his equals: and though it is his misfortune to be at variance with a nation, shall he inflame the quarrel by offensive expressions, and thus deprive himself of the hopes of a sincere reconciliation? Homer's heroes call each other dog and drunkard, and in their wars they observed no manner of decorum; they were filled with the most brutal outrages. Frederick Barbarossa, with other emperors, and the popes their enemies treated each other with the same roughness and violence. Let us congratulate our age on the superior gentleness of its manners, and not decry as an empty politeness, customs which have consequences truly substantial.

§ 65.
Decency
and mode-
ration to be
observed in
the mani-
festos.

These formalities, the necessity of which is deducible from the principles

§ 66.
When war

is to be
termed
lawful, and
in form.

principles and the very nature of war, are the characteristics of a lawful war, and made in form, (*justum bellum*). Grotius * says, that, according to the law of nations, two things are required to make a war solemn, or in due form. 1st, That on both sides it should be by authority of the sovereign. 2dly, That it should be accompanied with certain formalities. These formalities consist in the demand of a just satisfaction (*rerum repetitio*), and in the declaration of war at least on the part of him who attacks, defensive war requiring no declaration (§ 57), nor even on urgent occasions, so much as an express order from the sovereign. In effect, these two conditions are necessary to make a war lawful, according to the law of nations, that is, such as nations have a right of making. The right of making war belongs only to the sovereign (§ 4), and he has a right of taking arms only when refused just satisfaction (§ 37), and even then not till after having declared war (§ 51). A war in form is also called a regular war, certain rules, either prescribed by the law of nature, or adopted by custom, being observed in it.

§ 67.
Is to be
distinguish-
ed from a
war with-
out form.

A war lawful and in form, is carefully to be distinguished from an unlawful war entered on without any form, or rather from those incursions which are committed either without lawful authority, or apparent cause, as likewise without formalities, and only for havock and pillage. Grotius, Book III. Chap. III. relates several instances of the latter. Such were the wars of the *Grandes Campagnes*, which had assembled in France, during the wars with the English; armies of banditti which ranged about Europe, purely for spoil and plunder: such were the Cruises of the Flibustiers without commission, and in time of peace; and such in general are the depredations of Pirates. To the same class belong almost all the expeditions of the African Corsairs, though authorized by a sovereign, they being founded on no apparent just cause, and whose only motive is the avidity of captures. I say, these two sorts of wars, lawful and unlawful, are to be carefully distinguished; their effects, and the rights arising from them, being very different.

§ 68.
Grounds of
this distinc-
tion.

In order to perceive rightly of the foundation of this distinction, it is necessary to recollect the nature and scope of a lawful war; it is only as the last remedy against obstinate injustice that the law of nature allows of war. Hence arise the rights which it gives, as we shall explain in the sequel: hence likewise the rules to be observed in it. And it being equally possible that one or other of the parties may have right on his side, and that on the account of the independency of nations, this is not to be decided, (§ 40). The condition of the two enemies is the same, while the war lasts. Thus when a nation or a sovereign has declared war against another sovereign, by reason of a difference arisen between them, their war is what among nations is called a lawful war, and in form; and as we shall more

* De Jure Belli et Pacis, Lib. I. Cap. III. Sect. 4.

particularly

particularly shew * the effects, by the voluntary law of nations, are the same on both sides, independently of the justice of the cause. Nothing of all this takes place in a war void of form, and unlawful, more properly called robbery, being undertaken without right, without so much as an apparent cause. It can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules of wars in form. It may treat them as robbers. The city of Geneva, after defeating the attempt of the famous Escalade †, hung up the Savoyards, whom they had made prisoners; as robbers who had attacked them without any cause, or declaration of war. No body offered to censure this proceeding, which would have been detested in a formal war.

C H A P. V.

Of the Enemy, and Things belonging to the Enemy.

THE enemy is he with whom a nation is at open war. The § 69.
 Latins had a particular term (*Hostis*) to denote a public Who is an
 enemy, as distinguishing it from a private enemy, (*Inimicus*). enemy.
 Our language affords but one word for these two classes of persons, which yet are to be carefully distinguished. A private enemy is one who seeks to hurt us, and takes pleasure in it. A public enemy forms claims against us, or rejects ours, and maintains his real or pretended rights by force of arms. The former is never innocent; he nourishes rancour and hatred in his heart. It is possible that the public enemy may be free from such odious sentiments, that he does not desire our hurt, and is only for maintaining his rights. This is a necessary observation for regulating the dispositions of our heart towards a public enemy.

When the head of a state or sovereign declares war against another sovereign, it implies that the whole nation declares war § 70.
 against the other, (Book I. § 40, 41), as the sovereign re- All the sub-
 presents the nation, and acts for the whole society. And the jects of the
 nations are concerned with each other respectively, only as bodies, two states
 in their quality as nations. Thus these two nations are enemies, at war are
 and all the subjects of the one are enemies to all the subjects of the enemies.
 the other inclusively. Herein custom agrees with the principles.

Enemies continue such, wherever they happen to be. The § 71.
 place of abode is of no account here. It is the political ties Enemies
 which determine the quality. Whilst a man remains a citizen continue
 of his own country, he remains the enemy of all those with whom such in all
 his nation is at war; but we are not to conclude from this, that places.
 these enemies may treat each other as such, wherever they happen to meet; every one being master in his respective country, a

* Chap. XII.

† In the year 1602.

neutral prince will not allow them to use any violence in his territories.

§ 72.
Whether
women and
children
are to be
accounted
enemies

§ 73.
Of things
belonging
to the
enemy.

Women and children, being subjects of the state, and members of the nation, they are to be reckoned among enemies; but this does not import that it is lawful to use them as men who carry arms, or are able to carry them. It will be seen that the same rites are not allowable against every kind of enemies.

After precisely determining who are enemies, it is easy to know what are the things belonging to the enemy, (*res hostiles*). We have shewn that not only the sovereign with whom we are at war is an enemy, but also his whole nation, even to the very women and children: whatever belongs to this state, to the sovereign, to the subjects of any age or sex; all these, I say, may be called things belonging to the enemy.

§ 74.
Continue
such every-
where.

And it is here also as with persons; things belonging to the enemy continue such wherever they are. Whence, no more than with regard to persons (§ 71), it is not to be inferred that we have a right every where of treating them as things belonging to the enemy.

§ 75.
Of neutral
things
found with
an enemy

Since it is not the place where a thing is, which determines the nature of that thing, but the quality of the person to whom it belongs; things belonging to neutral persons, which happen to be in an enemy's country, or the enemy's ships, are to be distinguished from those belonging to the enemy. But it is the owner that must clearly prove that they are his, as, in default of such a proof, a thing is naturally presumed to belong to the nation with which it is found.

§ 76.
Of lands
possessed by
foreigners
in an ene-
my's coun-
try.

The foregoing paragraph relates to moveable goods, but the rule is different with regard to immoveables. To estates in land, as they all in some measure belong to the nation, are part of its domain, of its territory, and under its government. (Book I. § 204. 255. Book II. § 114); and the proprietor being always a subject of the country as possessor of a parcel of land, goods of this nature do not cease to be the enemy's goods (*res hostiles*), though possessed by a neutral stranger. Nevertheless, war being now carried on with so much moderation and indulgence, safeguards are allowed to houses and lands possessed by foreigners in an enemy's country. For the same reason, he who declares war does not confiscate the immoveable goods possessed in his country by his enemy's subjects. In permitting them to purchase and possess those goods, he has in this respect admitted them into the number of his subjects. But the income may be sequestered, for hindering the remittance of it to the enemy's country.

§ 77.
Of things
due to the
enemy by
a third per-
son.

Among the rights belonging to the enemy are likewise incorporeal things, all his rights, titles, and debts, excepting however those kind of rights granted by a third person, and in which he is so far concerned that it is not a matter of indifference to him, by whom they are possessed. Such for instance, are the rights of commerce. But as debts are not of this number, war gives us the

same

same rights over any sum of money due by neutral nations to our enemy, as it can give over his other goods.

When Alexander, by conquest, became absolute master of Thebes, he remitted to the Thessalians a hundred talents which they owed to the Thebans *. The sovereign has naturally the same right over what his subjects may be indebted to enemies. Therefore he may confiscate debts of this nature, if the term of payment happen in the time of war, or at least he may prohibit his subjects from paying while the war lasts. But at present, in regard to the advantage and safety of commerce, all the sovereigns of Europe have departed from this rigour. And as this custom has been generally received, he who should act contrary to it would injure the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed. The state does not so much as touch the sums which it owes to the enemy. Every where, in case of a war, funds credited to the public are exempt from confiscation and seizure.

C H A P. VI.

Of the Enemy's Allies; Societies of War, Auxiliaries, and Subsidies.

WE have sufficiently spoken of treaties in general, that here we shall touch on this subject only in its particular relations to war. § 78.
Of treaties relative to war. Treaties relating to war are of several kinds, and vary in their objects and clauses, according to the will of those who make them. Besides applying to them all that we have said of treaties in general (Book II. Ch. XII. &c.) they may also be divided into treaties real and personal, equal and unequal, &c. But also those which relate to their particular object, war, have their specific differences.

Under this relation, alliances made for war are divided in general into *defensive* alliances and *offensive* alliances. § 79.
Of defensive and offensive alliances. In the former the nation engages only to defend its ally in case he be attacked: in the latter a nation joins with him for attacking, and for jointly carrying the war into another nation. Some alliances are both offensive and defensive, and an alliance is seldom offensive without being also defensive. But it is very usual for alliances to be purely defensive; and these are in general the most natural and lawful. It would be too tedious, and even of little use, to go through the detail of all the variety in these alliances. Some are made without restriction towards and against all; in others certain states are excepted; a third is formed nominally, against such or such a nation.

But a difference of great importance to be observed, especially in defensive alliances, is that between an intimate and com- § 80.
Difference between societies of war and

* Grotius de Jure Belli & Pacis, Lib. III. Cap. VIII. § 4.

treaties of
succour.

plete alliance, in which we engage to make the cause common, and another in which we promise only a settled succour; the alliance making a common cause is a *society of war*. Every one acts with his whole force; all the allies become principals in the war; they have the same friends and the same enemies: but an alliance of this nature is more especially termed a *society of war* when it is offensive.

§ 81.
Of auxilia-
ry troops

When a sovereign, without directly taking part in the war made by another sovereign, sends him only succours of troops or ships; these are called *auxiliaries*. The *auxiliary* troops serve the prince to whom they are sent, according to their sovereign's orders. If given purely and simply without restriction, they are to serve equally on the offensive or defensive; and in the conduct of the several operations, they are to obey the prince to whose assistance they come. Yet this prince has not the free and entire disposal of them, as of his own subjects; they are granted him only for his own wars, and he has no right to transfer them as auxiliaries to a third power.

§ 82.
Of subsid-
ies.

Sometimes this succour of a power, which does not directly take part in the war, consists in money, and then it is called *subsidy*. This term is now often taken in another sense, and signifies a sum of money paid annually from one sovereign to another, in return for a body of troops, furnished for his wars or kept ready for his service. The treaties for procuring such a resource are called *subsidy-treaties*. France and England have at present such treaties with several of the northern powers and princes in Germany, and even in times of peace.

§ 83.
When a
nation is
allowed to
assist an-
other.

For judging of the morality of these several treaties or alliances, of the lawfulness of them, according to the law of nations. This must be laid down as an incontestible principle: *It is lawful and commendable to succour and assist, every way, a nation making a just war; and even this assistance is the duty of every nation, which can give it without being wanting to itself. But he who makes an unjust war is not to be assisted in any manner.* There is nothing in this which is not demonstrated by all that we have said of the common duties of nations towards each other (Book II. Ch. I.) To support right when we are able, is always commendable: but to assist an unjust party is to partake of his guilt; it is being no less unjust than himself.

§ 84.
And to
make al-
liances for
war.

If to the principle we have laid down, be added the consideration of what a nation owes to its proper safety, of the care which it is so natural and so fit to take for putting ourselves in a condition of making head against an enemy; we shall more clearly perceive the great right a nation has to make alliances for war, and especially defensive alliances, the tendency of which is only to maintain every one in the quiet and secure possession of his property.

But great circumspection is to be used in contracting such alliances. Engagements by which a nation may be drawn into a war, when it is the farthest from any such thoughts, are to be taken only

for

very important reasons, and with a direct view to the good of the state. We here speak of alliances made in a profound peace, and by way of precaution against future incidents.

If an alliance is to be contracted with a nation already engaged in a war, or just entering on it, two things are to be considered; § 85.
Of alli-
ances made
with a na-
tion whilst
at war.
1. The justice of that nation's quarrel. 2. The good of the state. If the war which the prince is making or is going to make, be unjust, it is not allowable to form an alliance with him, for injustice is not to be supported. Or if his war be well grounded, this consideration still remains, whether the good of the state allows or advises to embark in his quarrel: for it is only for the good of the state that the sovereign is to use his authority; to this all his steps should tend, and especially the most important. What other consideration can authorize him to expose his people to the calamities of a war?

As it is allowable only in a just war to send succours, or to § 86.
Tacit
clause in
every alli-
ance of
war. make alliances; so every alliance, every society of war, every treaty of succours, previously made in time of peace, when no particular war is intended, necessarily and of itself includes this tacit clause, that the treaty shall take place only in a just war. On any other footing the alliance could not be validly contracted. (Book II. § 161, 168).

But care must be taken that thereby treaties of alliances be not reduced to vain and illusory formalities. The tacit restriction is to be understood only of a war evidently unjust; for otherwise a pretence of eluding treaties would never be wanting. Are you going to contract an alliance with a power actually at war, it behoves you most religiously to weigh the justice of his cause; the judgment depends solely on you, as you owe him no duty, any farther than the justice of his quarrel, and the suitableness of your circumstances to join in it. But when once engaged, nothing less than the manifest injustice of his cause can excuse you from assisting him. In a doubtful case you are to presume that your ally is well-grounded; that being his concern.

But if you have great doubts, you may meditate an accommodation. And it will be very commendable; as you may clear up the right by perceiving which of the two declines accepting equitable conditions.

As every alliance carries with it the tacit clause just mentioned, § 87.
To refuse
succours
for an un-
just war is
no breach
of alliance. he who refuses succour to his ally in a war, manifestly unjust, does not break the alliance.

When alliances have thus been previously contracted, the cases in which a nation is to act, in consequence of the alliance, and in which the force of the engagements consists, are on occasion to be determined. This is what is called *casus fœderis*, or case of the alliance. It consists in the occurrence of the circumstances for which the treaty has been made, whether those circumstances be expressly specified or tacitly supposed. Whatever has been promised in the treaty of alliance is due in the *casus fœderis*, and not otherwise. § 88.
What the
casus fœ-
deris is.

§ 89.

Never
takes place
in an unjust
war.

As the most solemn treaties cannot oblige persons to favour an unjust quarrel (§ 86), the *casus fœderis* never takes place in a war manifestly unjust.

§ 90.

How it ex-
ists in a de-
fensive war.

In a defensive alliance the *casus fœderis* does not exist immediately on our allies being attacked: we are still to see whether he has not given his enemy a just cause for making war against him. For we cannot have engaged to defend him that he may be enabled to insult others, or refuse them justice. If he is in the wrong, we are to use our endeavours with him for bringing him to offer a reasonable satisfaction; and if his enemy will not be contented with it, then, and not till then, the obligation of defending him commences.

§ 91.

And in a
treaty of
guarantee.

But if the defensive alliance imports a guarantee of all the territories at that time possessed by the ally; the *casus fœderis* takes place immediately on the invasion of these territories, or when threatened with an invasion. If they are attacked for a just cause, the ally must be induced to give satisfaction; but we may on good grounds oppose his being deprived of his possessions; as generally the guaranty of them is undertaken for our own security. Besides, the rules of interpretation, which we have given in an express chapter *, are to be consulted, for determining on particular occasions the existence of the *casus fœderis*.

§ 92.

The suc-
cour is not
due under
an inability
of furnish-
ing it, or
when the
public safe-
ty would
be exposed.

If the state, which has promised succours, find itself unable to furnish them, its very inability is its exemption: and if the furnishing the succours would expose it to an evident danger, this is also a lawful dispensation. The case would render the treaty pernicious to the state, and therefore not obligatory. (Book II. § 160). But we here speak of an imminent danger threatening the very safety of the state; the case of such a danger is tacitly and necessarily reserved in every treaty. As to remote or slender dangers, they being inseparable from every military alliance, it would be absurd to pretend that they should make an exception: and the sovereign may risque them in consideration of the advantages which the nation reaps from the alliance.

In virtue of these principles, a nation involved in a war, which requires all its forces, is dispensed with from sending succours to its ally. If able to face the enemy, and at the same time to send the assistance stipulated, no reason can be pleaded for such dispensation. But in such a case, every one is to judge of what his situation and force allow. It is the same with other things which may have been promised; for instance, provisions. There is no obligation to furnish an ally with them when we want them ourselves.

§ 93.

Of some
other cases,
and that
where two
confeder-
ates of the
same alli-
ance come
to a rup-
ture.

I shall forbear repeating here what I have said of several other cases in discoursing of treaties in general, as of the preference due to the most ancient ally (Book II. § 167), and to a protector (§ 204), of the sense to be given to the word allies, in a treaty where they are reserved (Ibid. § 309). Let us only add on this last question, that in an alliance for war made towards and against

all, *with reservation of allies*, exception is to be understood only of the present allies. Otherwise it would afterwards be easy to elude the former treaty by new alliances; it would never be known what is done, or what is acquired by concluding such a treaty.

A case which we have not spoken of is this: Three powers have entered into a treaty of defensive alliance; two of them quarrel, and make war on each other; what shall the third do? The treaty does not bind it to assist either the one or the other. For it would be absurd to say that it has promised assistance to each against the other, or to one of the two in prejudice of the other. All that is incumbent on it, is to employ its good offices for reconciling its allies: and if such mediation fails, a liberty remains of assisting that nation which shall appear to have justice on its side.

To refuse an ally the succours due to him, without any just dispensation, is doing him an injury. It is violating the perfect right, which we give him by a formal engagement. I speak of evident cases, it being then only that the right is perfect; for in doubtful cases every one is to judge what he is able to do, (§ 92); but he is to judge maturely, and impartially, and act with candour. And there being a natural obligation of repairing the damage caused by our fault, and especially by our injustice, we are bound to indemnify an ally for all the losses he may have sustained from our unjust refusal. How much circumspection therefore is to be used in engagements, by a failure in which our honour or our affairs must greatly suffer! and on the other hand the fulfilling such may be attended with the most important consequences.

An engagement which may draw on a war is of great moment: it concerns the very safety of the state. He who in an alliance promises a subsidy or a body of auxiliaries, sometimes thinks that he risks only a sum of money, or a certain number of soldiers; whereas he often exposes himself to war, and all its calamities. The nation against which he furnishes succours will look on him as their enemy; and should the fate of their arms prove favourable, they will carry the war into his country. But it remains to see whether such a thing can be done justly, and on what occasions. Some authors * decide in general, that whoever joins our enemy, or assists him against us with money, troops, or in any other manner whatever, becomes thereby our enemy; and gives us a right of making war against him. A cruel decision, and destructive of the tranquillity of nations! It cannot be supported by principles, and happily the practice of Europe is directly the reverse.

Every associate of my enemy is indeed himself my enemy; it matters little whether any one makes war on me directly, and in his own name, or under the auspices of another; whatever rights war give me against my principal enemy, the like it gives me against all his associates. For these rights I derive from that of

§ 94.
Of a nation's refusing succours due in virtue of an alliance.

§ 95.
Of the enemy's associates.

* See Wolfii Jus Gentium, § 730. 736.

safety, from the care of my own defence; and I am equally attacked by the one and the other; but the question is to know whom I may lawfully account my enemy's associates, united against me in war.

§ 96.
They who
make a
common
cause are
the enemy's
associates.

First, in this number I shall class all who make a real society of war with my enemy; who make a common cause with him, though the war be made in the name of that principal enemy. There is no need of proving this: in the ordinary and open societies of war it is carried on in the name of all the allies, who are equally enemies (§ 80.)

§ 97.
And they
who assist
him, with-
out being
obliged to
it by trea-
ty.

Secondly, I account associates of my enemy, those who assist him in his war, without being obliged to it by any treaty. By this free and voluntary engagement against me, they make themselves my enemies: if they go no farther than furnishing a determined succour, allowing some troops to be raised, advancing money, but otherwise observe to me all the duties of friendly and neutral nations; I may conceal the subject of complaint, yet still I have a right to demand their reasons. This prudence of not always coming to an open rupture with those who give such assistance to my enemy, that they may not join him with all their forces; this forbearance, I say, has gradually introduced the custom of not looking on such assistance as an act of hostility, especially when it consists only of the permission of raising volunteers. How often have the Switzers granted levies to France, at the same time that they refused such an indulgence to the house of Austria, though both powers were in alliance with them? How often have they allowed of them to one prince, and denied them to his enemy, when in no alliance with either? They granted, or denied them, as they judged it expedient to themselves, and they never have been attacked on such account. But if prudence dissuades us from making use of all our right, it does not thereby destroy that right. A cautious nation chuses rather to dissemble than unnecessarily to increase the number of its enemies.

§ 98.
Or who are
in a defen-
sive alliance
with him.

Thirdly, they who being united to my enemy by an offensive alliance, powerfully assist him in the war, which he declares against me; these, I say, concur in the injury intended against me. They shew themselves my enemies, and I have a right to treat them as such. And the Switzers, above mentioned, in their grant of troops, usually make it defensive. Those in the service of France have always received orders from their sovereigns not to carry arms against the empire, or against the states of the house of Austria in Germany. In 1644 the captain of the Neuchattel regiment of *Guy*, on information that they were to serve under marshal Turenne in Germany, declared that they would die rather than disobey their sovereign, and violate the alliances of the Helvetic body. Since France has been mistress of Alsatia, the Switzers, in her armies, never pass the Rhine to attack the empire. The brave Daxelhoffer, captain of a Berne company in the French service, consisting of 200 men, and of which his

four

four sons formed the first rank, seeing the general would oblige him to pass the Rhine, broke his pike, and marched back with his company to Berne.

Even a defensive alliance made expressly against me, or which amounts to the same thing, concluded with my enemy during the war, or on the certain prospect of its declaration, is an act of association against me; and if followed by effects, I may look on the party contracting as my enemy. The case is the same with that of him who assists my enemy without being obliged to it, and of his own accord makes himself my enemy. (See § 97.)

The defensive alliance, though general, and made before any appearance of the present war, produces also the same effect, if it imports the assistance of all the allies, for it is then a real league or society of war. And therefore it would be absurd that I should be debarred from carrying the war into a nation which opposes me with its whole force, and stopping up the source of those large succours which it gives my enemy. What is an auxiliary coming to make war on me at the head of all his forces? It would be mockery to pretend not to be my enemy. What could he do more, was he openly to term himself such? This is not out of regard to me, but to himself. Shall he preserve his provinces in peace, secure from all danger, and yet at the same time do me all the mischief in his power? No, the law of nature, the law of nations, obliges us to justice, but does not condemn us to be dupes.

But if a defensive alliance has not been made particularly against me, nor concluded at the time when I was openly preparing for war, or had already begun it, and if the allies have only stipulated in it, that each of them shall furnish a stated succour to him who shall be attacked, I cannot require that they should neglect to fulfil a solemn treaty, which they had an unquestionable right to conclude without any injury to me. The succours furnished to my enemy are the payment of a debt; they do me no wrong in discharging it, and consequently give me no just cause to make war on them (§ 26.) Neither can I say that my safety obliges me to attack them, for I should thereby increase the number of my enemies, and instead of a slender succour which they furnished against me, should draw on myself all the united force of those nations. Therefore it is only the auxiliaries sent by them who are my enemies. These are actually joined to my enemies, and fight against me. The contrary principles tend to multiply wars, and spread them without measure to the common ruin of nations. It is happy for Europe that herein agrees with the true principles. A prince seldom takes upon him to complain of succours furnished for the defence of an ally, promised by former treaties, by treaties not made against him. In the last war the United Provinces furnished the queen of Hungary with subsidies, and even troops, and France never complained against these proceedings till those troops marched into Alsatia to attack their frontiers. Switzerland, in virtue of its alliances with

§ 99.
How a defensive alliance affects with the enemy.

§ 100.
Another case.

§ 101.
In what case it does not produce the same effect.

France, furnishes that crown with a large body of troops, and notwithstanding lives in peace with all Europe.

One only case here is exceptionable; that of a defensive war, manifestly unjust. For then there is no longer any obligation of assisting an ally (§ 86, 87, 89.) A nation engaging in it unnecessarily, and contrary to its duty, does an injury to the enemy, and declares against him out of mere wantonness; but this is a case very rarely known among nations. There are few defensive wars without at least some apparent reason for warranting their justice and necessity. Now, on any dubious occasion, each state is to judge of the justice of its arms, and the presumption is in favour of the ally (§ 86.) Besides, it belongs to you what you have to do, agreeably to your duties and to your engagements; and consequently nothing less than the most palpable evidence can authorise the enemy of your ally to charge you with supporting an unjust war, contrary to your understanding and conscience. In fine, the voluntary law of nations prescribes, that in every case susceptible of doubt, the arms of both parties, with regard to external effects, shall be accounted as equally lawful (§ 40.)

§ 101.
Whether it
be necessary
to declare
war against
the enemy's
associates.

The real associates of my enemy being my enemies, I have against them the same rights as against the principal enemy (§ 95.) And as they declare themselves such, as they first take arms against me, I may make war on them without any declaration: it is sufficiently declared by their own act. This is especially the case of those who in any manner whatever concur to make an offensive war against me, and it is likewise the case of all those whom we have mentioned in § 96, 97, 98, 99, 100.

But it is not thus with those nations which assist my enemy in a defensive war; I cannot consider them as his associates (§ 101.) If I am entitled to complain of their furnishing him with succours, this is a new difference between me and them, I may expostulate with them, and on not receiving satisfaction, prosecute my right, and make war on them. But in this case there must be a previous declaration (§ 51.) The instance of Manlius, who made war on the Galatians for having furnished succours to Antiochus, is not to the point. Grotius* censures the Roman general for beginning the war without a declaration. The Galatians in furnishing troops for an offensive war against the Romans had declared themselves enemies to Rome. Indeed, as a peace had been made with Antiochus, it seems as if Manlius should not have fallen on the Galatians till orders came from Rome, and then if this expedition was considered as a fresh war, it was not only to be declared, but satisfaction should have been asked, before proceeding to hostilities (§ 51.) But the finishing hand was not yet put to the treaty with the king of Syria, and it concerned only him, without any mention of his adherents. Therefore Manlius undertook the expedition against the Galatians as a con-

* Lib. III. Cap. III. Sect. 10. de *Jure Belli et Pacis*.

sequence or remainder of the war with Antiochus. This is what he himself very well observes in his speech to the senate *; and he even adds, that his first measure was to try whether he could bring the Galatians to reasonable terms. Grotius more appositely cites the examples of Ulysses and his companions, blaming them for attacking, without any declaration of war, the Ciconians, who during the siege of Troy sent succours to Priam †.

C H A P. VII.

Of the Neutrality and Passage of Troops through a neutral Country.

NEUTRAL nations in war, are those who take no part in it, remaining common friends to both parties, and not favouring the arms of one to the detriment of the other. Here we are to consider the obligations and rights flowing from neutrality. § 103.
Of neutral nations.

In order rightly to understand this question, we must avoid confounding what is allowable to a nation free from all engagements, with what it may do in a war, if it would be treated as perfectly neutral. A neutral nation desirous safely to enjoy the conveniences of that state, is in all things to shew an exact impartiality between the parties at war; for should he favour one to the detriment of the other, he cannot complain of being treated by him as an adherent and confederate of his enemy; his neutrality would be a fraudulent neutrality, but of which no nation would be the dupe. It is sometimes connived at, for want of ability to resent it; and is often permitted to avoid bringing additional forces on one's self. But here we examine what may be done lawfully, and not what prudence may dictate according to the conjunctures. Let us then see wherein this impartiality which a neutral nation is to observe, consists. § 104.
Conduct to be observed by a neutral nation.

It relates solely to war, and includes two articles, one not to give any succours when there is no obligation, nor freely to furnish troops, arms, ammunition, or any thing of direct use in war. I say, to give no succours, and not to give equally, for that a state should at one and the same time succour two states, would be absurd, as besides it would be impossible to do it equally. The same things, the like number of troops, the like quantity of arms, of stores, &c. furnished in different circumstances, are no longer equivalent succours. 2. In whatever does not relate to war, a neutral and impartial nation must not refuse to one of the parties, on account of its present quarrel, what it grants to the other. This does not trespass on its liberty in negotiations, connexions of friendship, its trade, or of governing itself by what is most advantageous to the state. When this reason induces it

* Tit. Liv. Lib. XXXVIII.

† Grotius ubi supra. Not. 3.

to preferences in things of which every one has the free disposal, it only makes use of its right, and is not chargeable with partiality. But to refuse any one of those things to one of the parties purely as being at war with the other, and for favouring the latter, would be departing from an exact neutrality.

§ 105.
An ally
may fur-
nish the suc-
cour due
from him,
and remain
neuter.

I have said that a neutral state is not to give succours to either of the parties, when *under no obligation*. This restriction is necessary; we have already seen that when a sovereign furnishes the moderate succour due in virtue of a former defensive alliance, he does not associate himself in the war (§ 101.) Therefore he may fulfil his engagements, and yet observe an exact neutrality. Of this Europe affords frequent instances.

§ 106.
Of the
right of re-
maining
neuter.

When a war breaks out between two nations, all others, not bound by treaties, are free to remain neuter, and the use of compulsion would be doing them an injury, being a violation of their independency in a very essential point. To themselves alone belongs the cognizance of what reasons may invite them to declare themselves, and herein they are to consider two things. 1. The justice of the cause. If it be evident, injustice is not to be countenanced. On the contrary, to succour oppressed innocence, when we are able, is amiable, is great. If the case be dubious, nations may suspend their judgment, and not engage in a foreign quarrel. 2. When convinced which side has the just cause, we are farther to consider whether it be for the good of the state to concern themselves in this affair, and to embark in the war.

§ 107.
Of treaties
of neutra-
lity.

A nation making war, or preparing to make it, often proposes a treaty of neutrality to that state which it most suspects. It is prudent to know in time what is to be expected, and not run the risk of a neighbour's suddenly joining with the enemy, in the heat of the war. In every case where neutrality is allowable, it is also lawful to engage in a treaty of this nature.

Sometimes necessity renders this justifiable, however it may be the duty of all nations to assist oppressed innocence, (Book II. § 4.) If an unjust conqueror, ready to fall on the property of another, offers me a neutrality when he is able to crush me, what can I do better than to accept it? I yield to necessity; and my inability discharges me from a natural obligation. The same inability would even excuse me from a perfect obligation contracted by an alliance. The enemy of my ally threatens me with a vast superiority of force; my fate is in his hand: he requires me to give up the liberty of furnishing any force against him. Necessity, and the care of my safety, frees me from my engagements. Thus it was that *Lewis XIV.* compelled *Victor Amadeus*, duke of Savoy, to quit the party of the allies. But then the necessity must be very urgent. It is only poltroons, or the perfidious, who avail themselves of the least fear to break their promises, and be wanting in their duty. In the late war the king of Poland, elector of Saxony, and the king of Sardinia, firmly held out against the misfortunes of events, and to their great honour, could not be brought to treat separate from their allies.

Another reason renders these treaties of neutrality useful, and even necessary; the nation which would secure its tranquillity amidst the flames of war kindling in its neighbourhood, cannot take better measures than by concluding treaties with both parties, expressly agreeing with what each may do or require in virtue of the neutrality. This is the method of securing peace, and preventing all chicane and altercation.

§ 108.
Additional
reason for
making
these treat-
ties.

Without such treaties it is to be feared disputes will often arise on what neutrality does, and does not allow. This subject offers many questions which authors have discussed with great heat, and which have given rise to the most dangerous quarrels between nations: yet the law of nature and of nations has its invariable principles, and affords rules on this head, as well as on the others. Some things also have grown into custom among civilised nations, and are to be conformed to by those who would not incur the reproach of unjustly breaking the peace. As to the rules of the natural law of nations, they result from a just combination of the laws of war, with the liberty, the safety, the advantages, the trade, and the other rights of neutral nations. It is on this principle that we shall lay down the following rules.

§ 109.
Foundation
of rules on
the neutra-
lity.

First, Whatever a nation does in a use of its own rites, and solely with a view to its own good, without partiality, without a design of favouring one power to the prejudice of another; cannot, I say, in general be considered as contrary to neutrality, and becomes such only upon particular occasions, when it cannot take place without injury to one of the parties, who has then a particular right to oppose it. Thus the besieger has a right to prohibit access to the place besieged. (See § 117, in the sequel.) Exclusively of this kind of cases the quarrels of another cannot deprive me of the free disposal of my rights in the pursuit of measures which I judge advantageous to my country. Therefore, when it is a custom in a nation, in order for employing and exercising its subjects, to permit levies of troops in favour of a power in whom it is pleased to confide; the enemy of this power cannot call these permissions hostilities; unless given for invading his territories, or for the defence of a cause manifestly odious and unjust. He cannot even claim, with any right, that the like should be granted to him; because this people may have reasons to refuse him, which do not hold good with regard to his adversary: and who but this nation shall be judge of its own conveniency. The Switzers grant levies of troops to whom they please, as we have already observed, and no body hitherto has thought fit to quarrel with them on this head. However it must be owned, that were these levies considerable, and formed my enemy's principle strength, while I, without alledging any solid reason, shall be absolutely refused the like privilege; I shall be thence intitled; and with good reason, to look on that nation as leagued with my enemy; and in this case the care of my own safety would warrant my treating them as such. It is the same in respect of money, which it was usual with a nation to lend out

§ 110.
How levies
may be al-
lowed, mo-
ney lent,
and every
kind of
things sold
without a
breach of
neutrality.

at interest, If the sovereign or his subjects lend money to my enemy, and refuse it to me, because they have not the same confidence in me; this is no breach of neutrality. They lodge their substance where they think it safest. If such preference be not founded on reasons, I may impute it to ill-will against me, or to a predilection of my enemy. Yet if I should make it a pretence for declaring war, both the true principles of the law of nations and the happy custom established in Europe, would join in condemning me. Whilst it appears that this nation lends out money purposely for improving it by interest, it is at liberty to dispose of it according to its own discretion, and I have no reason to complain.

But if the loan be manifestly for enabling the enemy to attack me, this would be concurring in the war against me.

Were such troops furnished to my enemy by the state itself, and at its expence, as also the money lent to him without interest, it would be no longer a question whether such succour be incompatible with neutrality.

Farther, it may be affirmed on the same principles, that if a nation trades in arms, timber, ships, military stores, &c. I cannot take it amiss that it sells such things to my enemy, provided it does not refuse to sell them to me also. It carries on its trade without any design of injuring me, and in continuing it the same as if I was not engaged in war, that nation gives me no just cause of complaint.

§ 177.
Of the trade
of neutral
nations
with those
which are
at war.

I here suppose that my enemy goes himself into a neutral country, to purchase what he has occasion for. Let us now discuss another point, namely, the trade which neutral nations carry on with my enemy's country. It is certain that as they have no part in my quarrel, they are under no obligation to abandon their trade that they may avoid furnishing my enemy with the means of making war. Should they refuse not to sell me any of these articles by taking measures for transporting great quantities of them to my enemy, with a manifest intention of favouring him; such a partiality would exclude them from the neutrality they enjoyed. But if they only continue their customary trade, they do not thereby declare themselves against my interest; they only exercise a right which they are under no obligation of sacrificing to me.

On the other hand, whenever I am at war with a nation, both my safety and welfare prompt me to deprive it, as far as possible, of every thing which may enable it to resist or hurt me. Here the law of necessity shews its force. If this law warrants me on occasion, to seize what belongs to another, shall it not likewise warrant me to stop every thing relative to war, which neutral nations are carrying to my enemy. Even if I should, by taking such measure, render all these neutral nations my enemies, I had better run the hazard, than suffer him who is actually at war with me, to be thus freely supplied, to the great increase of his power. It is therefore very proper and very suitable to the law

law of nations, which disapproves of multiplying the causes of war, not to consider those seizures of the goods of neutral nations as acts of hostility.

When I have notified to them my declaration of war against such or such a people, if they will afterwards run the risque of supplying them with things relative to war, let them not complain if their goods fall into my hands; for I do not declare war against them because they attempted to carry such goods. They suffer indeed by a war, in which they have no concern; but it is accidentally. I do not oppose their right, I only make use of my own; and if our rights clash with, and reciprocally injure each other, it flows from the effect of an inevitable necessity. This is a collision, which happens every day in war. When pursuant to my rights I exhaust a country from whence you drew your subsistence; when I besiege a city with which you carried on a large trade, I doubtless injure you, I cause losses and inconveniences; but it is without any design of hurting you. I only make use of my rights, and consequently do you no injustice.

But that limits may be set to these inconveniences, that the commerce of neutral nations may subsist in all the freedom which the laws of war will admit, there are rules to be observed, and on which Europe seems to be generally agreed.

The first is carefully to distinguish common goods, which have no relation to war, from those peculiarly subservient to it. In the trade of the former, neutral nations are to enjoy an entire liberty; the parties at war cannot with any reason deny it, or hinder the importation of such goods into the enemies country. In this the care of their safety, the necessity of defence, does not authorize them, as by these the enemy does not become more formidable. An attempt to molest or destroy this trade would be a breach of the rights of neutral nations, a flagrant injury to them; necessity, as we have just observed, being the only reason which can authorize a restriction of their trade and navigation to the ports of the enemy. England and the United Provinces having agreed in the treaty of Whitehall, signed on the 22d of August, 1689, to notify to all states, not at war with France, that they would attack, and previously declared every ship bound to, or coming out of the harbours of that kingdom, to be a lawful prize; Sweden and Denmark, from whom some ships had been taken, entered into a counter-treaty, on the 17th of March, 1693, for maintaining their rights, and procuring just satisfaction. And the maritime powers perceiving that the complaints of the two crowns were well grounded, did them justice *.

Commodities particularly used in war, and the importation of which to an enemy is prohibited, are called contraband goods. Such are arms, military and naval stores, timber, horses, and even

§ 112.
Of contraband goods.

* See other instances in Grotius, Lib. III. Ch. I. Sect. 3. Note 6. de Jure Belli & Pacis.

provisions, in certain junctures, when there are hopes of reducing the enemy by famine.

§ 113.
Whether
these goods
may be
confiscated.

But in order to hinder the carrying contraband goods to an enemy, are we only to stop and seize them, paying the cost to the owner; or have we a right to confiscate them? Barely to stop these goods would be generally effectual, especially at sea, where there is no possibility of cutting off entirely all access to the enemy's harbours. All contraband goods, therefore, on being seized, are confiscated, that the fear of loss by repressing the avidity of gain, may induce the merchants of the neutral countries to forbear supplying the enemy with contraband goods. And indeed it is so much the concern of a nation at war, to hinder as much as possible the carrying any such commodities to the enemy, which strengthen and render him more dangerous, that necessity, the care of its welfare and safety, authorise it to take effectual methods, by declaring that all commodities of that nature, destined for the enemy, shall be considered as lawful prize. On this account it notifies to the neutral states the declaration of war, (§ 63.) and these usually give orders to their subjects to decline all contraband commerce with nations at war, declaring that if they are taken in it, the sovereign cannot protect them. In this particular the present customs of Europe seems to be generally agreed, though this did not happen till after many variations, as may be seen in the note of Grotius just cited, and particularly by the ordinances of the kings of France, in the years 1543 and 1584, which only allow the French to seize contraband goods, and to keep them on paying the value. The modern custom is certainly far more agreeable to the mutual duties of nations, and entirely adapted to the preservation of their respective rights. The nation at war is highly concerned to deprive the enemy of all foreign assistance, and this gives it a right to consider those who carry to its enemy things necessary to war, if not absolutely as enemies, yet as people who make little difficulty of hurting it, and therefore punishes them by the confiscation of their goods. Should their sovereign offer to protect them, it would be equal to his furnishing the enemy with these succours himself: a measure doubtless incompatible with neutrality. A nation that without any other motive than the prospect of gain, is employed in strengthening my enemy, without regarding how far I may suffer*, is certainly far from being my friend, and gives me a right to consider and treat it as an associate of my enemy. To avoid therefore perpetual subjects for complaint and rupture, it has been agreed, in a manner entirely grounded on true principles, that the powers at war may seize and confiscate all contraband goods, which neutral persons shall attempt to carry to their enemy, without any complaint from

* In our time the king of Spain has prohibited all Hamburg ships from entering his harbours, that city having engaged to furnish the Algerine corsairs with military stores, and thus obliged it to revoke its contract with the state.

the sovereign of those merchants; as on the other hand, the power at war does not impute to the neutral sovereigns these practices of their subjects. Care is even taken to settle every particular of this kind in treaties of commerce and navigation.

Without searching neutral ships at sea the commerce of contraband goods cannot be prevented. There is then a right of searching. Some powerful nations have indeed, at different times, refused to submit to this search. "After the peace of Vervins, queen Elizabeth continuing the war with Spain, demanded that all French ships on their voyage to Spain may be searched, in order to discover whether they did not secretly carry military stores; but this was refused, as an injury to trade, and a favourable occasion to pillage *." At present, a neutral ship refusing to be searched, would from that proceeding alone be condemned as lawful prize. But to avoid inconveniences, violence, and every other irregularity, the manner of the search is settled in the treaties of navigation and commerce. According to the present custom credit is to be given to certificates and bills of lading, produced by the master of the ship; unless any fraud appear in them, or there be very good reasons for suspecting their validity.

Effects belonging to an enemy found on board a neutral ship are seizable by the rights of war; but by the law of nature the master is to be paid his freight, and not to suffer by the seizure.

The effects of neutrals found in an enemy's ship, are to be restored to the owners, against whom there is no right of confiscation, but without any allowance for detainer, decay, &c. The loss sustained by the neutrals on this occasion is an accident, to which they expose themselves by sending them in an enemy's ship; and the captor in making use of the law of war, is not answerable for any accidents resulting from it, no more than if a neutral passenger, who happened unfortunately to be in an enemy's ship, should be killed in the engagement.

Hitherto we have considered the commerce of neutral nations with the territories of the enemy in general. There is a particular case where the rights of war extend still farther. All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form the blockade, I have a right to hinder any one from entering, and to treat as an enemy whoever attempts to enter the place, or carry any thing to the besieged, without my leave; for he opposes my enterprise, may contribute to the miscarriage of it, and thus cause me to fall into all the evils of an unsuccessful war. King Demetrius hung up the master and pilot of a vessel carrying provisions to Athens, when he almost reduced the city by famine †. In the long and bloody war carried on by the United Provinces against Spain, for the recovery of their liberties, they refused the English the liberty of carrying goods to Dunkirk, before which the Dutch fleet lay ‖.

* Grotius ubi supra,

† Plutarch in Demetrio,

‡ Grotius ut supra.

A neu-

§ 114.
Of searching neutral ships.

§ 115.
Effects of an enemy found in a neutral ship.

§ 116.
Neutral effects on board the enemy's ships.

§ 117.
Trade with a place besieged.

§ 118.
Impartial
duties of
Neutrals.

A neutral nation continues with the two parties at war, in the several relations nature has placed between nations. It is ready to perform towards them both, all the duties of humanity, reciprocally due from nation to nation. It is in every thing, not directly relating to war, to give them all the assistance in its power, and of which they may stand in need. But this assistance is to be given with impartiality, that is, in not refusing to one of the parties any thing on account of his being at war with the other (§ 104.) This does not hinder a neutral state having particular connections of friendship and good neighbourhood with one of the parties at war, from granting him in whatever does not relate to military transactions the preference due to friends: much more may he, without giving offence, continue to him, for instance, in commerce, such indulgencies as have been stipulated in their treaties. It is therefore equally to allow, as far as the public good will permit, the subjects of the contending parties to visit its territories on business, or purchasing provisions, horses, and in general every thing they stand in need of; unless by a treaty of neutrality it has promised to refuse to both parties such commodities as are used in war. Amidst all the wars which disturb Europe, the Switzers keep their country in an unexceptionable neutrality. Every nation indiscriminately is allowed to come thither and purchase provisions, if the country has a surplus, horses, military stores, &c.

§ 119.
Of the pas-
sage of
troops in
a neutral
country.

An *innocent passage* is due to all naions with whom a state is at peace (Book II. § 123.) And this duty comprehends troops equally with individuals. But the sovereign of the country is to judge whether this passage be innocent, and it is very difficult for that of an army to be entirely so. In the late wars of Italy, the territories of the republic of Venice, with those of the pope, sustained very great damages by the passage of armies, and often became the theatre of the war.

§ 120.
Passage to
be asked.

The passage therefore of troops, and especially that of a whole army, being no matter of indifference, he who desires to march his troops through a neutral country is to ask the sovereign's permission. To enter his territory without his consent, is a violation of the rights of sovereignty and supreme dominion, by virtue of which this country is not to be disposed of for any use whatever, without his permission, either tacit or expressed. And a tacit permission for the passage of troops is not to be presumed, as the consequences of such a permission may be very detrimental.

§ 121.
May he re-
fused for
good rea-
sons.

If the neutral sovereign has good reasons for refusing a passage, he is not obliged to grant it; a passage in this case being no longer innocent.

§ 122.
In what
case it may
be forced.

In all doubtful cases, the judgment of the proprietor is to be referred to concerning the innocence of the use desired to be made of things belonging to another. (Book II. § 128, 130.) And his denial is to be observed, though possibly unjust. If the refusal was evidently unjust, and in the case now before us the pas-

passage unquestionably innocent, a nation may do itself justice, and take by force what it was unjustly denied. But we have already observed that it is very difficult for the passage of an army to be absolutely innocent, and much more so for the innocence to be very evident. The evils it may occasion, the dangers that may attend it, are so various, depend on so many particulars, and are so complicated, that to foresee and provide for every thing is next to impossible. Besides, self-interest has so powerful an influence on the judgments of men, that if he who requires the passage is to judge of its innocence, he will admit no reason brought against it, and thus a door is opened to continual quarrels and hostilities. The tranquillity and common safety of nations, therefore, require that each should be mistress of its own territory, and at liberty to deny every foreign army an entrance, when it has not departed from its natural liberties in this respect, by treaties; and the only exception in those very rare cases is, when it may be shewn in the most evident manner, that the passage required is absolutely without danger or inconveniency. If, on such occasion, a passage be forced, he who forces it will not be so much blamed as the nation that has indiscretely drawn this violence upon itself. Another case excepted also, is that of extreme necessity. Urgent and absolute necessity suspends all the right of property (Book II. § 119, 123.) And if the proprietor be not under the same case of necessity as you, it is allowable for you, even against his will, to make use of what belongs to him. When therefore an army must perish, or never return to its own country without passing through neutral territories, it has a right to force a passage, notwithstanding the sovereign's denial, and to clear its way by the sword. But it is first to ask leave to pass, to offer securities, and pay whatever damages it occasions. This was the behaviour of the Greeks on their return from Asia, under the conduct of Agesilaus*. Extreme necessity may even authorise the temporary seizure of a place, and the putting a garrison therein for defending itself against the enemy, or preventing him in his designs of seizing this place, when the sovereign is not able to defend it. But when the danger is over it must be immediately restored, paying all the charges, inconveniences, and damages, caused by seizing the place.

When the passage is not of absolute necessity, the danger alone of admitting a powerful army into one's country authorises a denial. The commander may be disposed to make himself master of it, or at least may act as sovereign, and live at discretion. Let it not be said with Grotius†, that he who requires the passage is not to be deprived of his right for our unjust fears. A probable fear, founded on good reasons, gives us a right to avoid what may render it real, and the conduct of nations affords too solid a foundation for the fear in question. Besides, a right of passage is

§ 123.

The fear of danger authorises a denial.

* Plutarch's life of Agesilaus.

† Book II. Ch. II. Sect. 13. Note 5.

not a *perfect* right, unless in the case of an urgent necessity, or the most perfect evidence that the passage is innocent.

§ 124.
Or to require all reasonable securities.

But in the preceding paragraph I suppose it impracticable to give security sufficient to remove every cause of fearing the attempts and violence of him who demands the passage. If such security can be given, the best method is to permit them to pass in small bodies only, at the same time delivering up their arms. Instances of which may be found in history*. The reason flowing from fear now no longer exists; therefore he who requires the passage should conform to every reasonable security required of him, and consequently submit to pass by divisions and deliver up his arms, if the passage is denied him on any other terms. The choice of what securities he is to give does not belong to him. Hostages, or a bond, would very often be slender securities. Of what benefit are hostages to me, from him who can immediately render himself my master? And of as little effect is a bond against a much superior power.

§ 125.
Whether there is always an obligation of complying with all kinds of securities.

But in order to pass through the territories of a nation, is there a constant necessity for giving every security it may require? The causes of the passage are first to be distinguished, and then the manners of the nation of whom it is demanded are to be considered. If the passage be not essentially necessary, and can be obtained only on suspicious or disagreeable conditions, it must be laid aside, as in the case of a refusal (§ 122.) But if necessity warrants me to pass, the condition on which the passage will be granted may be accepted or rejected, according to the manners of the people I am treating with. Suppose I am to cross the country of a wild, faithless, and barbarous nation, shall I leave myself at its discretion by giving up my arms, and causing my troops to march in divisions? This is so dangerous a step that I believe none will impose it on me. Necessity authorises me to pass, and even to pass in such a posture as will secure me from any ambush or violence. I will offer every security that can be given, without weakly exposing myself; and if the offer is rejected, I must be guided by necessity and prudence. I add, and by the most scrupulous moderation, that I may not trespass on the right derived from necessity.

§ 126.
Of the equality to be observed between both parties as to the passage.

If the neutral state grants, or refuses a passage to one of the parties at war, it is in like manner to grant or refuse it to the other, unless the alteration of circumstances gives it solid reasons for acting otherwise. Without such reasons, to grant one what is refused to another, would be shewing partiality, and receding from an exact neutrality.

§ 127.
A neutral state granting a passage is not to be complained of.

When I have no reason to refuse the passage, the party against whom it is granted has no room for complaint, much less for making it a pretence for a war, since I did no more than what the law of nations enjoins (§ 119.) Neither has he any right to require that I should deny the passage; because he is not to hinder

* The Egyptians, and the ancient inhabitants of Cologne. See Grotius, *ibid.*

me from doing what I think agreeable to my duty, and even on occasion when I might with justice deny the passage, it is allowable in me not to make use of my right, especially when I should be obliged to support my refusal by my sword. Who will take upon him to complain of my having permitted the war to be carried into his own country, rather than draw it on myself? It cannot be required that I should take up arms in his favour, unless obliged to it by a treaty. But nations more intent on their own advantages than the observation of strict justice, are often very loud on this pretended subject of complaint. In war, especially, they stick at no measures; and if by their threatenings they can intimidate a neighbour to refuse a passage to their enemy, they consider this conduct as a stroke of policy.

A powerful state will oppose these unjust menaces, and, firm to its justice and glory, will not be diverted by the fear of a groundless resentment: it will not even bear the menace. But a weak nation, unable to make good its party, will be under a necessity of consulting its safety; and this important concern authorises it to refuse a passage, which would expose it to danger too powerful for it to repel.

Another fear may also warrant the refusal, namely, that of drawing on its country the calamities of war. For should even he again to whom the passage is granted, observe such moderation as not to make use of menaces, that it may be refused, he will also on his part demand the like march to meet his enemy, and thus the neutral country will become the theatre of war. The infinite evils of such a situation are an unexceptionable reason for refusing the passage. In all these cases he who should attempt to force a passage injures the neutral nation, and gives it the greatest cause possible to join with the contrary party. The Swissers, in their alliance with France, had promised not to grant a passage to its enemies. They ever refuse it to all sovereigns at war, in order to secure their frontiers from this calamity. And they take care that their territory shall be respected; but make no scruple of granting a passage to recruits passing in small bodies and without arms.

The grant of passage includes that of every particular connected with the passage of troops, and of things without which it would not be practicable: such as the liberty of carrying whatever may be necessary to an army, that of exercising military discipline on the officers and soldiers, and that of buying at a reasonable rate every thing an army may want, unless a fear of scarcity render an exception necessary; when the army must carry with them their provisions.

He who grants the passage is, as far as lies in his power, to take care it be safe. This good faith requires; for to act otherwise would be drawing those who are passing into a snare.

For this reason, and as strangers can do nothing in a country against the sovereign's will, to attack an enemy in a neutral country, or commit in it any other hostility, is absolutely unlawful.

§ 128.

This state may refuse it from a fear of the resentment of the opposite party.

§ 129.

And that its country may not become the theatre of war.

§ 130.

What is contained in the grant of passage.

§ 131.

Safety of the passage.

§ 132.

No hostility to be committed in a neutral country.

ful. The Dutch East-India fleet having put into Bergen in Norway, in 1666, to avoid the English, were attacked by them. But the government of Bergen fired on the assailants, and the court of Denmark complained, perhaps too faintly, of an enterprize so injurious to its rights and dignity *.

To secure prisoners or spoil in a place of safety are acts of war, consequently not to be done in a neutral country; and whoever permitted it would break the neutrality as favouring one of the parties. But I here speak of prisoners and goods, not yet perfectly in the enemy's power, the capture of which is not, if I may be allowed the expression, fully completed. A flying party, for instance, cannot make use of a neighbouring and neutral country as a staple for securing its prisoners and spoil. To permit this would be to countenance and support its hostilities. When the capture is completed, and the booty absolutely in the enemy's power, no enquiry is made how he came by such effects, and he has a right to dispose of them any where. A privateer carries his prize into a neutral port, and there freely sells it; but he would not be allowed to put his prisoners ashore, in order to confine them; for to keep or detain prisoners of war is a continuation of hostilities.

§ 133.
Not to afford retreat to troops that they may again attack their enemies.

On the other hand it is certain, that on my enemy's being defeated, and too much weakened to escape me, if my neighbour affords him a retreat, allows him time to recover, and watch a favourable opportunity of making a second attack on my territories, this conduct, so pernicious to my safety and interests, would be incompatible with neutrality. If therefore, my enemy on a defeat retires into a neutral country, however charity may enjoin him not to refuse a passage and safety, he is to cause the troops, as soon as possible, to continue their march, and not permit them to watch an opportunity for attacking me. Because otherwise he gives me a right to enter his territories in quest of my enemy; a misfortune that too often attends nations unable to command respect. Their territories soon become the scene of war; armies march into it, encamp, and fight, as in a country open to all commerce.

§ 134.
Conduct to be observed by troops passing through a neutral country.

Troops to whom a passage is granted, are not to occasion the least damage in a country; they are to keep the public roads, and not to enter the possessions of private persons; to observe the most exact discipline, and punctually pay for every thing they want. And if the licentiousness of the soldiers, or the necessity of some operations, as encamping, intrenching, and the like, have caused any damage, the commander, or his sovereign, is to make reparation. All this requires no proof. By what right is an army to cause losses to a country, when the most he could ask was an innocent passage?

* The author of the *Present State of Denmark*, written in English, pretends that the Danes had engaged to deliver up the Dutch fleet, but that some reasonable presents made to the court of Denmark saved it. Chap. 15.

Nothing hinders but that a sum for damages, which it would be difficult to estimate, and for the inconveniences naturally resulting from the passage of an army, should be agreed on. But it would be fordid to sell the very grant of passage, nay even unjust, if the passage be attended with no damage; since, in this case, it is due. The sovereign, however, of the country is to take care that the damage be paid to the parties who suffer, for no right authorises him to reserve what is given for their indemnity. Too often indeed the weak sustain the loss, and the powerful retain the compensation.

Lastly, as an innocent passage can be due only to just causes, so it may be well refused to him who requires it for a war manifestly unjust, as, for instance, to invade a country without a reasonable pretence. Thus Julius Cæsar denied a passage to the Helvetians, who were quitting their country in order to conquer a better. Yet policy seems to have had a greater share in his denial than the love of justice: but on this occasion he was intitled to follow the maxims of his prudence. A sovereign who is in a condition to refuse without fear, should doubtless refuse in the case we now speak of. But if it be dangerous, he is not obliged to expose himself for the security of another; nay, to hazard rashly the quiet and welfare of his people is absolutely a very great breach of his duty.

§ 135.
A passage may be refused for a war manifestly unjust.

C H A P. VIII.

Of the Law of Nations in War, and first, of what there is a Right of doing, and what is permitted in a just War against the Enemy's Person.

WHAT we have said hitherto concerns the right of making war; let us now proceed to the right, which is to take place in the war itself, and to the rules which nations should reciprocally observe, even when deciding their differences by arms. We shall begin with the rights of nations, which make a just war, and discuss what is allowed to it against its enemy. All these are to be deduced from one single principle, the end of a just war. For when the end is lawful, he who has a right to prosecute this end is warranted in the use of all necessary means to attain it. The end of a just war is to *revenge, or prevent injury* (§ 28.), that is, to procure by force the justice which cannot otherwise be obtained; to compel an unjust person to repair an injury already done, or to give securities against any wrong threatened by him. On a declaration of war, therefore, this nation has a right of doing against the enemy whatever is necessary to this justifiable end of bringing him to reason, and obtaining justice and security from him.

§ 136.
General principle of the rights against an enemy in a just war.

The lawful end gives a true right only to those means which are necessary for obtaining such end. Whatever exceeds this is

§ 137.
Differences between
cen- what there

is a right of doing, and what is barely allowed or not punished among enemies.

is censured by the law of nature, is faulty, and will be condemned at the tribunal of conscience. Hence it is that the right to such or such acts of hostility varies according to their circumstances. What is just and perfectly innocent in a war, in one particular situation, is not always so in another. Right goes hand and hand with necessity, and the exigency of the case, but never exceeds it. It being, however, very difficult always to form a precise judgment of what the present case requires, and every nation being the judge of what its own particular situation will allow (Prelim. § 16.), nations must in this particular conform to general rules. Accordingly, whenever it is certain and evident that such a measure, such an act of hostility is necessary in general for overpowering the enemy's resistance, and attaining the end of a lawful war; this measure taken in general, is accounted by the law of nations a just right in war; though he who makes use of it unnecessarily, when he might attain his end by milder methods, is not innocent before God and his conscience. On this the difference between what is just, equitable, irreprehensible in war, and what is only allowed, and not punished among nations is founded. The sovereign who would preserve a pure conscience, and punctually discharge the duties of humanity, is never to lose sight of what we have already observed more than once, that nature gives him a right of making war, only in cases of necessity, when a remedy, ever disagreeable, though often necessary, must be used against obstinate injustice or violence. If he is penetrated with this great truth, he will never carry the remedy beyond its due limits, and will be very careful that it shall not fall with greater weight on mankind, and cause more calamity and desolation than is requisite for the defence of his rights and the care of his safety.

§ 138.
Of a right to weaken the enemy by all means justifiable in themselves.

The business of a just war being to suppress violence and injustice, it gives a right to compel by force, him who is deaf to the voice of justice. It gives a right of doing against the enemy whatever is necessary for weakening him; for disabling him from making any farther resistance in support of his injustice; and the most effectual, the most proper methods may be chosen, provided they have nothing odious, be not unlawful in themselves, or exploded by the law of nature.

§ 139.
Of the right of the enemy's person.

An enemy attacking me unjustly, gives me an undoubted right of repelling his violences, and he who opposes me in arms, when I demand only my right, becomes himself the real aggressor by his unjust resistance: he is the first author of the violence, and obliges me to make use of force for securing myself against the wrongs intended me, either in my person or possessions. For if the effects of this force proceed so far as to take away his life, he owes the misfortune to himself; for if by sparing him I should submit to the injury, the good would soon become the prey of the wicked. Hence the right of killing enemies in a just war is derived; when their resistance cannot be suppressed, when they are not to be reduced by milder methods, there is a right of taking away

away their life. Under the name of enemies, as we have already shewn, are comprehended, not only the first author of the war, but likewise all who join him, and fight for his cause.

But the very manner by which the right of killing enemies is proved, points out also the limits of this right. On an enemy's submitting and delivering up his arms, we cannot with justice take away his life. Thus in a battle quarter is to be given to those who lay down their arms, and at a siege, a garrison offering to capitulate are never to be refused their lives. The humanity with which most nations in Europe carry on wars at present, cannot be too much commended; if sometimes in the heat of action the soldier refuses to give quarter, it is always contrary to the inclination of the officers, who eagerly interpose for saving the lives of such enemies as have laid down their arms.

There is however one case where life may be denied an enemy who surrenders, and also capitulation refused to a place. This is when the enemy has been guilty of some enormous breach of the law of nations, and particularly if it be at the same time a violation of the laws of war. This denial of quarter is no natural consequence of the war, but the punishment of his crime; a punishment which the injured party has a right to inflict: but for this penalty to be just it must fall on the guilty. When the war is with a savage nation, which observes no rules, and never gives quarter, it may be chastised in the persons of any seized or taken, they are among the guilty, that by this rigour they may be brought to conform to the laws of humanity. But wherever severity is not absolutely necessary, clemency is to be used. Corinth was utterly destroyed for having violated the law of nations toward the Roman ambassadors. However that severity has been censured by Cicero and other great men. He who has even the most just cause to punish a sovereign as his enemy, will always incur the reproach of cruelty, should he cause the punishment to fall on the innocent people. There are other methods of chastising the sovereign: as the depriving him of some of his rights, taking from him towns and provinces. The evil which the whole nation suffers then, is a participation inevitable to the members of a political society.

This leads us to speak of a kind of retortion sometimes practised in war, under the name of reprisals. If a general of the enemy has, without any just reason, caused some prisoners to be hanged, a like number of his men, and of the same rank, will be hung up, signifying to him that this retaliation will be continued for obliging him to observe the laws of war. It is a sad extremity thus to put a prisoner to death for his general's fault, and if this prisoner before was promised his life, reprisals cannot be made on him with any colour of justice. Yet as a prince or his general has a right of sacrificing the life of his enemies to his safety, and that of his men, if he is engaged with an inhuman enemy, who frequently commits such enormities, he appears to have a right of refusing life to some of the prisoners

Y

he

§ 140.

Limits of

this right.

An enemy

not to be

killed after

ceasing to

resist.

§ 141.

A particu-

lar case ex-

cepted.

§ 142.

Of repri-

sals.

he may take, and of treating them as his were treated. But Scipio's generosity is rather to be imitated: that great man having reduced some Spanish princes who had revolted against the Romans, declared to them, that on a breach of their faith he would not call the innocent hostages to an account, but themselves; and that he would not revenge it on a disarmed enemy, but on those who should be found in arms*. Alexander the Great, having cause of complaint against Darius, for some mal-practices, sent him word, that if he continued to make war in such a manner, he would pursue him to the utmost, and give no quarter†. It is thus an enemy violating the laws of war is to be checked, and not by causing the penalty due to his crime to fall on innocent victims.

§ 143.
Whether a
governor of
a place can
be punished
with death
for an ob-
stinate de-
fence.

How could it be conceived in a knowing age, that it is lawful to punish with death a governor who has defended his place to the last extremity, or who in a weak place has presumed to make a stand against a royal army? Yet, even in the last century, this notion was so common as to make an article in the law of war, and even at present it is not totally exploded. What a thought! to punish a brave man for having performed his duty. Very different were the principles of Alexander the Great, when he gave orders for sparing some Milesians, *on account of their courage and fidelity*‡. "As Phyton was led to execution by order of Dionysius the Tyrant, for having obstinately defended the town of Rhegium, of which he was governor, he cried out, that to put him to death for defending the city was unjust, and that heaven would soon revenge it. And Diodorus Siculus terms this an unjust punishment§." It is in vain to object, that an obstinate defence, especially in a weak place, against a royal army, only causes a great effusion of blood to no purpose; for this defence may save the state, by delaying the enemy some days longer; and besides courage supplies the want of fortifications. The chevalier Bayard having thrown himself into Mezières, defended it with his usual intrepidity¶, and proved that a brave man is sometimes capable of saving a place, which another would not think tenable. The history of the famous siege of Malta is another instance how far men of spirit may defend themselves, when thoroughly determined. How many places have surrendered, which by a more regular and vigorous defence might have stopped the enemy a long time, have weakened their forces, occasioned the loss of the remainder of the campaign, or even have saved themselves? In the last war, whilst the strongest places in the Netherlands opened their gates in a few days, general Lentrum defended Coni against the efforts of two powerful

* Neque se in obsides innoxios, sed in ipsos, si defecerint, severitum: nec ab inermi, sed ab armato hoste pœnas expetiturum. Tit. Liv. Lib. XXVIII.

† Quint. Curt. Lib. IV. Cap. I. XI.

‡ Arrian de Exped. Alexand. Lib. I. Cap. XX.

§ Lib. XIV. Cap. CXIII. quoted by Grotius, Lib. III. Cap. II. Sec. 16. n. 5.

¶ See his Life.

armies holding out, in so indifferent a port, forty days from the opening of the trenches, saved his town, and with it all Piedmont. It is farther urged that by threatening a commander with death, you may shorten the bloody siege, spare your troops, and gain a valuable opportunity. My answer is, that a brave man will despise your menace, or, provoked at such ignominious usage, will sell his life at a dear rate, make you pay for your injustice, and bury himself under the ruins of his fort. But whatever advantage you might promise yourself from such an unlawful proceeding, this will not warrant you in the use of it. The menace of an unjust punishment is unjust in itself; it is an insult and an injury. But to execute it would be barbarous and horrible: and if it is not to take effect, I believe it will be allowed vain and ridiculous. Just and decent means may doubtless be used for inducing a governor not obstinately to reduce himself to the last extremity; and this is at present done by all wise and humane generals. A governor is summoned to surrender, and in the progress of the siege an honourable and advantageous capitulation is offered him, with an intimation that if he stays too long, he will be admitted only to surrender as a prisoner of war, and at discretion; if he persists, and at length is forced to surrender at discretion, all the severity of the law of war may be used, both against him and his troops. But this right never extends so far as to deprive an enemy of life, who lays down his arms (§ 140.) unless he has been guilty of some proportionate crime towards the conqueror. (§ 141.)

Resistance carried to extremity is punishable in a subaltern only, on such occasions when it is manifestly useless. It is then obstinacy, and not firmness or bravery. The end of true courage being always reasonable. Let us suppose, for instance, a state entirely reduced under the conqueror's arms, except one single fortress, that no succour is to be expected from without, no neighbour, no ally, concerns itself about saving the remainder of this conquered state: the governor is then to be acquainted with the state of affairs, summoned to surrender, and may be threatened with death on his persisting in a defence absolutely fruitless, and which can tend only to the effusion of human blood. Should this make no impression on him, he deserves the punishment with which he has been justly threatened. I suppose the justice of the war to be problematical, and that it is not an insupportable oppression which he opposes; for if this governor maintains a cause evidently just; if he fights to save his country from slavery; his misfortune will be pitied: the brave will commend him for holding out to the last, and dying free.

Deserters found by the victor among his enemies have rendered themselves guilty towards him, and he has doubtless a right of putting them to death. But they are not properly considered as enemies, and are rather perfidious citizens, traitors to their country, and this quality, their enlisting with the enemy cannot obliterate, nor exempt them from the punishment they

§ 144.
Of fugitive
deserters.

have deserved. At present, however, desertion being unhappily too common, the number of delinquents in some measure renders clemency necessary. And in capitulations a garrison is usually allowed to march out with a certain number of covered waggons in which the deserters are saved.

§ 145.
Of women,
children,
the aged
and sick.

Women, children, the sick and aged, are in the number of enemies (§ 70, 72.) And there are rights with regard to them, as belonging to the nation with which another is at war, and the rights and pretensions between nation and nation affect the body of the society, together with all its members. (Book II. § 81, 82, 344.) But these are enemies who make no resistance, and consequently give us no right to treat their persons ill, or use any violence against them, much less to take away their lives. (§ 140.) This is so plain a maxim of justice and humanity, that at present every nation, in the least civilised acquiesces in it. Sometimes indeed the soldier in his brutal rage has forced women, or killed them, and put children and aged persons to the sword, but these are excesses at which the officers are extremely concerned, and do all they can to put a stop to; and a wife and a humane general even punishes them. However, if women are desirous of being spared, they are to employ themselves in the occupations of their sex, and not to play the men in taking arms. Accordingly the military law of the Switzers, which forbids maltreating women, formally excepts those who have committed any acts of hostility*.

§ 146.
Of the
clergy, of
men of let-
ters, &c.

The like may be said of the clergy, of men of letters, and other persons, whose callings are very remote from military affairs. Not that these have necessarily and by their functions any character of inviolability with respect to an enemy, or that the civil law can confer it on them: but as they do not appear in arms, and oppose no force against the enemy he has no right to use any against them. Among the ancient Romans the priests carried arms; Julius Cæsar himself was sovereign pontiff. Dig-nitaries, bishops and cardinals have been seen in a military garb, and commanding armies. From the time of their acting so, they subject themselves to the common fate of military persons. In battle, it is presumed, that they did not pretend to be inviolable.

§ 147.
Of pea-
sants, and
in general
of all who
do not car-
ry arms.

Formerly, every one capable of carrying arms became a soldier, when his nation was at war, and especially when attacked. Grotius† however produces instances of several nations and eminent commanders‡ who spared the peasantry in consideration of the immediate usefulness of their labour. At present war is carried on by regular troops; the people, the peasants, the inhabitants of towns and villages do not concern themselves in it, and generally have nothing to fear from the enemy's arms. If the inhabitants submit to him who is master of the country, pay the contributions imposed, and refrain from all hostilities, they live as

* See *Simler de Repub. Helvet.* † *Book III. Ch. XI. Sect. 11.* ‡ *Cyrus, Belshazzar, &c.*

safe as if they were friends; they even continue in possession of what belongs to them. The country people come freely to the camp to sell their provisions, and care is taken that they shall feel the calamities of war as little as possible. A laudable custom, and truly worthy those nations who pretend to humanity, and advantageous to the enemy himself, who finds his account in this moderation; by protecting the peaceable inhabitants, keeping the soldiers in strict discipline, and preserving a country, the general procures an easy subsistence to his army, and saves it many losses and dangers. If he has any reason to mistrust the people, he has a right to disarm them, to require hostages from them: and they who are for avoiding the calamities of war must submit to the laws which the enemy thinks proper to impose on them.

But all these enemies thus subdued or disarmed, who from the principles of humanity are to be spared, belonging to the opposite party may lawfully be secured and made prisoners, either that they may not take up arms against him, or that the enemy may be weakened (§ 138.) or, lastly, that by getting into our power, some person or child for whom the sovereign has an affection, the deliverance of these valuable pledges may induce him to equitable conditions of peace. Indeed the European nations at present seldom make use of the last expedient, an entire security and liberty being granted to women and children to withdraw where they please. But this moderation, this politeness, doubtless very commendable, is not in itself absolutely obligatory, and if a general thinks fit to supersede it, he cannot be justly accused of breaking the laws of war. He is at liberty to act in this respect as he thinks best for his own affairs. If without reason, and from meer caprice he denies women this liberty, he will be deemed a sour morose man, he will be censured for not conforming to a custom established by humanity: but he may have good reasons for disregarding politeness, or even the impressions of pity in this respect. If there are hopes of reducing by famine a strong place of great importance, the useless mouths are not permitted to come out. And in this there is nothing which is not authorised by the law of war. Some great men however have, on occasions of this nature, carried their compassion so far as to postpone their interests to the motions of humanity.

We have mentioned before what Henry the Great did when he besieged Paris; to such a noble example we shall add that of Titus at the siege of Jerusalem; he was at first for driving back into the city great numbers of perishing wretches who came out of it; but he could not withstand the compassion such a sight raised in him, and the sentiments of humanity prevailed over the maxims of war.

As soon as your enemy has laid down his arms and surrendered his person, you have no farther right over his life (§ 140.) unless he should give you such a right by some new crime, or had before committed against you a crime deserving death (§ 141.). Therefore it was a dreadful error of antiquity, a most unjust and savage claim, to assume a right of putting

§ 143.
Of the
right of
making
prisoners of
war.

§ 149. 7
A prisoner
at war not
to be put to
death.

ting a prisoner of war to death, and even by the hand of the executioner. However, it is now a long time since more just and humane principles have taken place. Charles I. king of Naples, having defeated and taken prisoner Conrade, his competitor, caused him to be beheaded at Naples, together with Frederic of Austria, his fellow prisoner. This barbarity raised an universal horror, and Peter the third king of Arragon, reproached Charles with it as a detestable crime, and till then unheard of among christian princes*. However, the case was of a dangerous rival contending with him for the throne. But supposing the claims of his rival were unjust, Charles might have kept him in prison till he had renounced them, and given security for his future behaviour.

§ 150.
How prisoners of war are to be used.

Prisoners may be secured, and for this purpose shut up: and if there is cause to fear their rising or running away, they may be even fettered. But they are not to be treated harshly, unless personally guilty towards him who has them in his power. In this case he may punish them, otherwise he should remember that they are men and unfortunate. When an enemy is conquered, and submits, a great soul forgets all resentment, and is entirely filled with compassion for him. The European nations are highly to be praised. Prisoners of war are seldom ill-treated among them. We extol, we love the English and French at hearing the accounts of the treatment given to prisoners of war on both sides, among those generous nations. And what is more, by a custom which equally displays the humanity of the Europeans, an officer, taken prisoner of war, is released on his parole, and enjoys the comfort of passing the time of his imprisonment in his country, with his family; and the party releasing him thinks itself as secure of him as if it had detained him in the closest prison.

§ 151.
Whether prisoners, who cannot be kept or fed may be put to death.

Formerly a question, not a little perplexing, might have been proposed. When the number of prisoners is so great as not to be kept or fed with safety, is there a right of putting them to death? Or shall they be sent back to the enemy at the hazard of thus strengthening him, so as on another occasion to gain the advantage? At present the case is plain. These prisoners are sent back on their parole, not to carry arms for a certain time, or to the end of the war. And as every commander necessarily has a power of agreeing to the conditions on which the enemy admits his surrender, the engagements entered into by him for saving his life or his liberty with that of his men, are valid, as made within the limits of his powers (§ 19), and his sovereign cannot annul them. Of this many instances appeared during the last war; several Dutch garrisons submitted to the conditions of not serving against France, or its allies, for one or two years. A body of French troops in Lintz, being hemmed in, were by capitulations sent on this side the Rhine, and under a restriction

* Epist. Pet. Arrag. apud Petr. de Vincis.

not to carry arms against the queen of Hungary for a stated time. The sovereigns of these troops adhered to their several engagements; but these conventions have their limits, which consist in not prejudicing the rights of the sovereign over his subjects. Thus an enemy may require from prisoners, in consideration of their release, that they shall not carry arms against him till the end of the war; having a right to keep them prisoners till then. But he cannot require that they shall for ever renounce the liberty of fighting for their country, as at the end of the war their imprisonment ceases; and they, on their side, cannot take on themselves an engagement absolutely contrary to their quality, as citizens or subjects. If their country forsakes them, they are free, and equally entitled to a renunciation on their side. But if we are concerned with a formidable nation, savage and perfidious, shall we send back its soldiers, by whom it may be enabled to destroy us? When our safety is incompatible with that of an enemy, though subdued, it is out of all question, but that in cool blood a great number of prisoners should be put to death. But it is required, 1. That they were not promised their lives. 2. It must be well weighed, even to a certainty, that our safety evidently demands such a sacrifice. If prudence will in any-wise permit, either to trust to their parole, or to disregard their perfidiousness, a generous enemy will rather listen to the voice of humanity than to that of a timorous circumspection. Charles XII. being incumbered with prisoners, after the battle of Narva, only disarmed them and sent them away; but his enemy, who had not yet forgot the fear which such hardy and intrepid warriors had raised in him, caused the Swedish prisoners, which he took at Pultowa, to be carried into Siberia. The Swedish hero was too confident in his generosity, while the dextrous monarch of Russia was as rigorously severe in his prudence: but necessity excuses severity, or rather causes it to be overlooked. Admiral Anson, on taking the rich *Acapulco* Galleon near Manila, and finding his prisoners to out-number his whole ship's company, he confined them in the hold, by which they suffered extremely*. But had he exposed himself to the loss both of so rich a prize and of his own ship, would the humanity of his conduct have justified the imprudence of it? At the battle of Agincourt, Henry V. king of England, after his victory, was, or at least thought himself, under the cruel necessity of sacrificing the prisoners to his own safety.

"In this universal route, says father Daniel, a fresh misfortune happened, which cost the lives of a great number of French. A remainder of their van was retreating in some order, and many joined it, which the king of England, from an eminence, observing, supposed their intention was to renew the battle. At the same time he received advice that his camp, where he had left his baggage, was attacked, and so it

* See Anson's Voyage round the World.

"was; for some Picard gentlemen, at the head of about 600 peasants, had fallen on the English camp. This prince apprehensive of some unlucky incident, sent aid du camps through the army, with orders for putting all the prisoners to the sword, lest, should the battle be renewed, his soldiers might be incumbered with the care of keeping them, or they might force an escape, and join their countrymen. The order was immediately put in execution, and all the prisoners cut off *." It is only the greatest necessity which can justify so terrible an execution, and the general whose case requires it, is greatly to be pitied.

§ 152.
Whether
prisoners of
war may
be made
slaves?

Are prisoners of war to be made slaves? Yes; in cases which give a right to kill them, when they have rendered themselves personally guilty of some crime deserving death. The ancients used to sell their prisoners of war for slaves. They indeed thought they had a right of putting them to death. In every circumstance, when I cannot innocently take away my prisoner's life, I have no right to make him a slave. If I spare his life, and condemn him to a state so contrary to the nature of man, I still continue with him the state of war. He lies under no obligation to me, for what is life without freedom? If any one counts life a favour when the grant of it is attended with chains, let him enjoy it, let him accept the kindness, submit to his conditions; and fulfil his duties! But they are not what I shall teach him: he may find enough said of them in other authors: I shall dwell no longer on the subject, and indeed this disgrace of mankind is happily extinct in Europe.

§ 153.
Of the ex-
change and
ransom of
prisoners.

For this reason prisoners of war are detained, that they may not return again to the enemy, or else for obtaining from their sovereign a just satisfaction, as the price of their liberty. There is no obligation of releasing those who are detained with the latter view, till after satisfaction is obtained. As to the former, whoever makes a just war has a right, if he thinks proper, to detain his prisoners till the end of the war. And then on releasing them, he may justly require a ransom, either as a compensation at a peace, or if the war continues, for diminishing his enemy's finances, at the same time that he strengthens him with the return of soldiers. The European nations, who are ever to be commended for their care in alleviating the evils of war, have, with regard to prisoners, introduced humane and salutary customs. They are exchanged or ransomed even during the war, and that is generally stipulated in a previous cartel. However, if a nation finds a considerable advantage in leaving its soldiers prisoners with the enemy during the war, rather than exchange them, it may certainly, unless bound by cartel, act as is most agreeable to its interest. This would be the case of a state abounding in men, and at war with a nation more formidable by the courage than the number of its soldiers. It would have

been of little advantage to the czar, Peter the Great, to restore the Swedes, his prisoners, for an equal number of Russians.

But the state is obliged, as soon as it can be done without danger, and has the means in its hands, to deliver, at its own expence, such of its citizens and soldiers as are prisoners of war. They are fallen under this misfortune only by acting for its service and in support of its cause. The same reason dictates that it shall provide for their support during imprisonment. Formerly prisoners of war were obliged to redeem themselves; but then the ransom paid belonged to the officers or soldiers who took them: the modern use is more agreeable to reason and justice. If prisoners cannot be delivered during the course of the war, at least their liberty must, if possible, make an article in the treaty of peace. This is a care which the state owes to those who have exposed themselves for it. However, it must be allowed that every nation may by a law, after the example of the Romans, and for inspiring their soldiers to make the most vigorous resistance, prohibit prisoners of war from ever being ransomed: when this is agreed on by the whole society nobody can complain. But such a law is very harsh, and could scarce suit any but those ambitious heroes who were determined on sacrificing every thing for making themselves masters of the world.

§ 154.
The state
is obliged
to deliver
them.

Since in this chapter we are treating of the rights derived from war, against the person of the enemy, we cannot more properly introduce a celebrated question on which authors have been much divided, and this is whether all sorts of means may be employed to take away an enemy's life? whether he may be assassinated or poisoned? Some have advanced that in a right of taking away life, the manner is indifferent. A strange maxim! but happily exploded by the confused ideas of honour only. I have a right in civil society to punish a slanderer, to cause my property to be restored by him who unjustly detains it; but shall the manner be indifferent. Nations may do themselves justice sword in hand, when otherwise refused to them; shall it be indifferent to human society that they employ odious means, capable of carrying desolation through the whole earth, and from which the most just and most equitable of sovereigns, however strongly supported by others, shall not be able to preserve himself? But in order to dismiss this question with solidity, assassination is by all means to be distinguished from surprizes, which in war are doubtless very allowable. Should a resolute soldier in the night-time steal into the enemy's camp, get to the general's tent, and stab him, in this there is nothing contrary to the natural laws of war, nothing but what in a just and necessary war is commendable. Mutius Scævola has been praised by all the great men of antiquity, and Porfenna himself, whom he intended to kill, could not but commend his courage*. Pepin, father of

§ 155.
Whether
an enemy
is to be
assassinated
or poison-
ed?

† See Tit. Liv. Lib. II. Cap. XII. Cicero pro P. Sextio. Valer. Max. Lib. III. Plutarch. Vit. Poplicol.

Charlemagne, having passed the Rhine with one of his guards went and killed his enemy in his chamber*. Whatever absolute censures have been passed on such bold strokes, the end of them was only to flatter those among the great, who are for leaving all the dangerous part of war to the soldiers and subalterns. Usually indeed the authors are punished with some painful death; but it is because the prince or the general who is in this manner attacked, in his turn makes use of his rights, takes care of his safety, and by the example of torture endeavours to deter his enemies from attacking him otherwise than by open force. He may proportion his rigour towards an enemy according as his own safety requires. Indeed it would be more commendable on both sides to disclaim every kind of hostility, which lays the enemy under a necessity of employing tortures for securing himself from them. It may become a custom, a conventional law of war. The generous warriors of the present age dislike such attempts, and would never make the experiment, except on those rare occasions, when they become necessary to the very safety and being of their country. As to the six hundred Lacedæmonians, who under Leonidas broke into the enemy's camp, and made their way directly to the king of Persia's tent†, their expedition was according to the common rules of open war. And the king could not treat them more rigorously than other enemies. A strict watch baffles any such irruption, so that it would be unjust to make use of tortures in their punishment. Accordingly at present they are only exercised against those who convey themselves by subtilty, alone, or in a very small number, and especially if disguised. I therefore call assassination a treacherous murder, whether it be perpetrated by traitors, subjects of the person whom we cause to be assassinated, or of one's own sovereign; whether it be executed by the hand of any other emissary, introducing himself as a suppliant, a refugee, a deserter, or, in fine, as a stranger; and such an attempt, I say, is infamous and execrable, both in him who executes it, and in him who enjoins it. Why do we judge an act to be criminal, and contrary to the law of nature, but because such an act is pernicious to human society, and the use of it would be destructive to men? Now what could be more terrible than the custom of hiring a traitor to assassinate our enemy. Besides, were such a licentiousness introduced, the most pure virtue, the friendship of the greatest part of sovereigns would not secure a prince's safety. Had Titus lived in the time of the old man of the mountain, all his tenderness for the happiness of mankind, his punctual observance of peace and equity, the respect and adoration of every power, could have been no preservative. On the first quarrel which the prince of the assassins had taken into his head to raise against him, those virtues, that universal affection, would

* Grotius Lib. III. Cap. IV. Sect. 18. n. 1. † Justin. Lib. II. Cap. II.

not have saved him, and mankind would have lost their darling. It is of no consequence to say that these extraordinary strokes are permitted only in favour of right; since in their wars all pretend to have right on their side. Thus, whoever by his example contributes to the introducing so destructive a custom, declares himself the enemy of mankind, and deserves the execration of all ages*. The assassination of William Prince of Orange was generally detested, though the Spaniards had declared that prince a rebel. And the same nation denied as an atrocious calumny, the having the least concern in that of Henry the Great, who was preparing for a war against them, which might have shook their monarchy.

A treacherous poisoning has something more odious even than assassination; the effect would be more inevitable, and the use more terrible; accordingly it has been more generally detested. Of this Grotius has accumulated many instances†. The consuls Caius Fabricius and Q. Æmilius rejected with horror the proposal of Pyrrhus's physician to poison his master, and even gave notice to that prince, that he might be ware of the traitor, haughtily adding, "It is not to make our court to you that we give this information, but that we may not draw on ourselves any infamy‡." And they excellently say, in the same letter, that it is for the common interest of all nations not to set such examples§. It was a maxim of the Roman senate, that war was to be carried on by arms, and not by poison||. Even Tiberius himself rejected the proposal made by the prince of the Catti, that if poison was sent to him he would destroy Arminius. And he received for answer, that the Roman people chastised their enemies by open force, without having recourse to wicked practices and secret machinations¶. Tiberius thus making it his glory to imitate the virtue of ancient Roman commanders.

This instance is the more remarkable, as Arminius had treacherously cut off Varius with three Roman legions. The senate, and even Tiberius himself did not think that poison was to be made use of even against a deceiver, or by way of retaliation or reprisal. Assassination and poisoning are therefore contrary to the laws of war, and equally exploded by the law of nature, and the consent of civilised people. The sovereign practising such execrable means should be accounted the enemy of mankind, and the common safety calls on all nations to unite against him, and join their forces to punish him. His conduct

* See the dialogue between Julius Cæsar and Cicero, in the *Melanges de Littérature & Poësie*.

† Grotius, Book III. Chap. IV. Sect. 15.

‡ Οὐδὲ γὰρ ταῦτα σὴ χάρις μνησθῆναι, ἀλλ' ἔπος μὲν το σὺν πάσι; ἡμῖν διαβολὴν ἐνεργῶ, &c. Plutarch in Vita Pyrrhi.

§ Sed communis exempli & fidei ergo visum est, uti te saluum velimus; ut effect quem armis vincere possemus. Apud Aul. Gell. Noct. Attic. Lib. III. Ch. VIII.

|| Armis belli, non venenis, geri debere. Valer. Maxim. Lib. VI. Ch. V. num. 1.

¶ Non fraude neque occultis, sed palam & armatum, populum Romanum hostes suos ulcisci. Tacit. Annal. Lib. II. Ch. LXXXVIII.

particularly

particularly authorises the enemy, who had been attacked by such odious means, to give him no quarter. Alexander declared, "That he was determined to pursue Darius to the utmost, and no longer as a fair enemy, but as a poisoner and an assassin *." The interest and safety of commanders and rulers, so far from countenancing such practices, should excite them to use all possible care to suppress them. It was wisely said of Eumenes, "That he did not think any general would, to gain a victory, set a pernicious example which might recoil on himself †." And it was on this same principle that Alexander formed his judgment of Bessus, who had assassinated Darius ‡.

§ 158.
Whether
poisoned
weapons
may be
used in
war?

The use of poisoned arms may be excused with a little more plausibility, at least here is no treachery, no clandestine practice; however, this use is not the less interdicted by the law of nature, which does not allow us to multiply the evils of war. To get the better of an enemy's efforts he must be struck, and if once disabled, what necessity is there that he should inevitably die of his wounds? Besides, if you poison your arms, the enemy will follow your example. And thus, without any advantage to yourself for the decision of the quarrel, you will render the war more cruel and horrible. War is never permitted to nations but from necessity; all are to refrain from methods which tend to render it more destructive, and they are even obliged to oppose them. It is therefore with reason, and agreeable to their duty, that civilised nations have classed among the laws of war, the maxim which prohibits the poisoning of arms §. And all are warranted by their common safety to suppress and punish the first who should offer to break through this law.

§ 157.
Whether
springs
may be
poisoned?

The poisoning waters, wells, and springs, is still more generally condemned, because, say some authors, innocent persons, as well as enemies, may lose their lives. This is indeed a further reason, but it is not the only, nor indeed the true, for it is lawful to fire on an enemy's ship though there may be neutral passengers on board. But though poison is not to be used, it is very allowable to divert the water, cut off the springs, or by any other manner to render them useless, that the enemy may be reduced to surrender ||. This is a milder way than that of arms.

§ 153.
Disposi-
tions to-
wards an
enemy.

I cannot conclude this subject, of what we have a right to do against the persons of the enemy, without speaking a few words concerning the dispositions we are to preserve towards them. They are indeed deducible from what we have hitherto said (Book II. Chap. I). Let us never forget that our enemies are men. If we are under the disagreeable necessity of prosecuting our right by force of arms, let us not destroy that charity which connects

* Quint. Curt. Lib. IV. Cap. XI. num. 18. † Nec Antigonum nec quemquam Ducum, sic velle vincere, ut ipse in se exemplum possumus statuatur. Justin. Lib. XIV. Ch. I. num. 12. ‡ Quemquidem (Bessum) cruci additum videre festino, omnibus gentibusque fidei, quam violavit, meritis peras solventem. Q. Curt. Lib. VI. Ch. III. n. 14. § Grotius, Book III. Chap. IV. § 16.
|| Grotius, ibid. § 17.

us with all mankind. Thus shall we courageously defend our country's rights without hurting those of society. Our courage will preserve itself from every stain of cruelty, and the lustre of victory will not be tarnished by inhuman and brutal actions. Marius and Attila are now detested; whereas we cannot forbear admiring and loving Cæsar; his generosity and clemency almost preponderate against the injustice of his interprizes. Moderation and generosity redound more to the glory of a victor than his courage; they are more certain marks of a soul truly great. Besides the honour which infallibly accompanies this virtue, humanity towards an enemy, has been often attended with immediate and real advantages. Leopold duke of Austria, besieging Soleure, in the year 1318, threw a bridge over the Aar, and posted on it a large body of troops. The river soon after, by an extraordinary swell of its waters, carried away the bridge: on which the besieged hastened with such dispatch to the relief of the men posted on it, that they saved the greatest part of them. Leopold relenting at this act of generosity, raised the siege, and came to an accommodation with that state*. The duke of Cumberland, after the victory of Dettingen †, appears to me still greater than in the heat of the battle. As he was under the surgeon's hands, a French officer, much more dangerously wounded than himself, being brought that way, the prince immediately directed his surgeon to leave him, and assist that officer. Did the great know how such actions endear them, and what respect results from such humane conduct, they would study to imitate them, even though their sentiments were not of a suitable elevation. At present the European nations seldom fail of making war with a great deal of moderation and generosity. These dispositions have given rise to several commendable customs, and which are frequently carried to the height of politeness. Sometimes refreshments are sent to the governors of a besieged town. It is not usual to fire on the king's or the general's quarters. This moderation is always a gainer, when we have to do with a generous enemy; but it is no farther binding than as it does not hurt the cause we defend; and it is clear that a wise general will, in this respect, regulate himself by junctures, by what the safety of the army and state requires, by the greatness of the danger, and by the temper and conduct of the enemy. Should a weak nation or town be attacked by a furious conqueror, threatening to destroy it, is it to forbear firing on its quarters? Far from it; that is the very place to which, if possible, every shot should be directed.

Formerly, he who killed the king or general of the enemy was commended, and greatly rewarded; the honours annexed to his *spolia opima* are well known. Nothing was more natural; the ancients usually fighting for their safety, and the death of the leader put an end to the war. In our time a soldier would scarce be suffered to boast of having killed the sovereign of the enemy.

§ 159.
Of regard
towards the
person of
a king who
is our ene-
my.

* Hist. Helvet confeder. Tom. I. p. 126, 127.

† 1743.

Thus

Thus sovereigns tacitly agree on the safety of their persons. It must be owned that in a war, little enflamed, and where the welfare of the nation does not lie at stake, this regard for regal majesty is entirely commendable, and perfectly consonant to the reciprocal duties of nations. In such a war to take away the life of the enemy's sovereign, when it might be spared, is probably doing more hurt than is necessary from bringing the quarrel to a happy issue. But on every occasion to spare a king's person is not a law of war; and the obligation is only when there is a power of easily taking him prisoner.

C H A P. IX.

Of the Right of War, with regard to Things belonging to the Enemy.

§ 160.
Principles
of the right
over things
belonging
to the ene-
my.

A State taking arms in a just cause has a double right against its enemy. 1. A right of putting itself in possession of what belongs to it, and which the enemy withholds; and to this must be added the expences incurred to this end, the charges of the war, and the reparation of damages. For were the nation obliged to bear these expences and losses, it would not fully obtain what is its due, or what belongs to it. 2. It has a right of weakening the enemy, for disabling him from supporting an unjust violence (§ 138.) The right to take from him all means of resistance. Hence arise, as from their principles, all the rights of war with regard to things belonging to the enemy: I speak of ordinary cases, and of what particularly relates to the enemy's goods. On certain occasions the right of punishing him produces new rights over the things which belong to him, as it also gives over his person: these we shall presently consider.

§ 161.
The right
of taking
them.

A nation has a right to deprive the enemy of his possessions, and goods, of every thing which may augment his forces, and enable him to make war. This every one endeavours to perform in the manner most suitable to him. A nation on every opportunity lays his hands on the enemy's goods, appropriates them to itself, and thereby, besides weakening the adversary, strengthens itself, and at least in part, procures an indemnification, an equivalent, either for the very cause of the war, or for the expences and losses resulting from it: a nation here does itself justice.

§ 162.
Of what is
taken from
the enemy
by way of
penalty.

The right of safety is often a warrant for punishing injustice or violence. It is an additional plea for depriving an enemy of some part of his possessions. This manner of chastising a nation is more humane than making the penalty to fall on the persons of the citizens. In this view things of value, rights, cities, provinces, may be taken from him; but all wars do not give a just cause of punishment. The nation which has, with justice and

moderation, supported a bad cause, is in the eye of a generous conqueror rather an object of compassion than resentment: and in a doubtful cause we are to suppose that the enemy sincerely thinks himself in the right (Prelim. § 21. Book III. § 40.) It is therefore nothing less than manifest injustice, void even of plausible pretences, or odious excesses in the proceeding, which give an enemy the right of punishing: and on every occasion the punishment is to be limited by what his own safety and that of the nation requires. To be swayed by clemency, as far as prudence will admit, is noble; that amiable virtue seldom fails of being more useful than inflexible rigour. The clemency of Henry the Great was of singular advantage to his courage, when that good prince found himself compelled to conquer his own kingdom. Those who would have continued enemies, if subdued only by arms, his goodness rendered affectionate subjects.

In fine, a nation seizes on what belongs to the enemy, his towns and provinces, for bringing him to reasonable conditions, for constraining him to accept of an equitable and solid peace. Thus much more is taken from him than he owes, more than is claimed of him: but this with a design of restoring the surplus by a treaty of peace. The king of France was, in the last war, known to declare that he aimed at nothing for himself, and at the treaty of Aix-la-Chapelle he actually gave up all his conquests*.

As the towns and lands taken from the enemy are called *conquests*, all moveable things constitute the *booty*. This *booty* naturally belongs to the sovereign making war, no less than the conquests; for he alone has such claims against the enemy as warrant him to seize on his goods, and appropriate them to himself. His soldiers, and even the auxiliaries, are only instruments in his hand for asserting his right. He maintains and forms them. Whatever they do is in his name, and for him. Thus there is no difficulty even with regard to the auxiliaries; if they are not associates in the war, it is not made for them, they have no more right to the booty than the conquests. But the sovereign may grant the troops what share of the booty he pleases. At present most nations allow them whatever they can make on certain occasions, when the general allows of plundering what they find on enemies fallen in the field of battle, the pillage of a camp which has been forced, and sometimes that of a town taken by assault. The soldier in several services has also the property of what he can take from the enemy's troops when he is on a party, or in a detachment, excepting artillery, military stores, magazines, and convoys of provision or forage, which are applied to the wants and use of the army. This custom being once admitted in an army, it would be injustice to exclude auxiliaries from the right allowed to the national troops. The Roman soldier was obliged

§ 163.

Of detentions for obliging him to give a just satisfaction.

§ 164.

Of booty.

* The peace was become absolutely necessary to him, and he had in return for his few conquests, Louisbourg, with all its dependencies, which were of more importance to him.

to bring in all the booty he had taken to the public stock. This the general caused to be sold, and after distributing a part among the soldiers, according to rank, the rest was consigned to the public treasury.

§ 165.
Of contributions.

Instead of the pillage of the country and defenceless places, a custom has been substituted more humane and more advantageous to the sovereign making war. I mean that of contributions. Whoever carries on a just war has a right of making the enemy's country contribute to the support of the army, and towards defraying all the charges of the war. Thus he obtains a part of what is due to him, and the subjects of the enemy, on submitting to this imposition, are secured from pillage, and the country is preserved. But a general who would not sully his reputation, is to moderate his contributions, and proportion them to those on whom they are imposed. An excess in this point is not without the reproach of cruelty and inhumanity: if it shew less ferocity than ravage and destruction, it glares with avarice. The instances of humanity and discretion cannot be too often cited. The long wars of France in the reign of Lewis XIV. furnish an instance which can never be too much commended. The sovereigns being respectively interested in the preservation of the country, used on the commencement of the war to enter into treaties, for regulating the contributions on a supportable footing: both the extent of the country in which each could demand contributions, the amount of them, and the manner in which the parties sent for levying them were to behave, were settled. In these treaties it was expressed, that no body of men under a certain number, should advance into the enemy's country beyond the bounds agreed on, under the penalty of being treated as *parti bleu* *. This was preventing a multitude of disorders and enormities, committed on quiet people, and generally without the least advantage to the sovereigns at war. Whence is it that an example so noble and wise has not been established?

§ 166.
Of spoiling.

If for weakening an unjust enemy (§ 161.) or for punishing him (§ 162.), it be lawful to carry off his goods, the same reasons justify the destroying what cannot conveniently be carried off. Thus a country is ravaged, the provisions or forage destroyed, that the enemy may not find a subsistence there. When his ships cannot be taken or brought off, endeavours are used to sink them; all this tends to put an end to the war. But these means are to be used only with moderation, and according to the exigency. To tear up vines, or cut down fruit trees, is accounted illegal and savage, except inflicted to punish some crime committed by the enemy against the laws of war. This is to desolate a country for many years, and what no safety can require. Such a conduct is not dictated by prudence, but by hatred and fury.

§ 167.
Of ravaging and burning.

However, on certain occasions, matters are carried still farther; a country is totally ravaged, towns and villages are sacked,

* Marauders, or robbers.

set on fire, and the inhabitants put to the sword. Dreadful extremity, even when forced to it! Savage and monstrous excesses, when committed without necessity! however, they are authorised by two reasons. 1. The necessity of chastising an unjust and barbarous nation, for checking its brutality, and preserving one's self from its depredations. Who will question that the king of Spain and the powers of Italy have not a very good right utterly to destroy those maritime towns of Africa, those nests of pirates, which are continually molesting their commerce and abusing their subjects; but who will run such lengths with a view of punishing only their sovereign? It is but indirectly that he will feel the punishment; and how cruel is it to ruin an innocent people; in order to reach him. The same prince, whose firmness and just resentment was commended in the bombardment of Algiers, was after that of Genoa accused of pride and inhumanity. 2. A country is ravaged, and rendered uninhabitable, for making a barrier, for covering a frontier against an enemy, who cannot be stopped any other way. A hard resource indeed! but may it not be used against an enemy, when with the same prospect a sovereign lays waste his own provinces? Czar Peter the Great, in his flight before the army of Charles XII. to stop the impetuosity of a torrent which he could not withstand, destroyed his own country for above fourscore leagues at length. By this means the Swedes became quite spent with want and fatigue, and at Pultowa the Russian monarch reaped the fruits of his circumspection and sacrifices. But violent remedies are not to be wantonly used, there must be reasons of suitable importance to justify the use of them. A prince who should without necessity imitate the czar's conduct, would be guilty of a great crime in regard to his people: and he who does the like in an enemy's country, when under no constraint, or on weak reasons, becomes the scourge of society. The French in the last century ravaged and burnt the palatinate *. All Europe resounded with invectives and reproaches on this manner of making war. The court vainly covered it with the design of securing its frontiers. This was an end which could be little answered by laying waste the palatinate. It was well known to be the revenge and cruelty of a haughty and implacable minister.

For whatever cause a country be ravaged, he ought to spare ^{§ 163.} those edifices which do honour to human society, and do not ^{What} contribute to the enemy's power; such as temples, tombs, public buildings, and all works of a remarkable beauty. ^{things are} What advantage is obtained by destroying them? He who acts thus declares himself an enemy to mankind, wantonly depriving them of these monuments of art and models of taste. This is the light in which Bellisarius represented it to Tottila, king of the Goths†. We still detest those barbarians for destroying so many wonders ^{to be} spared.

* In 1674, and a second time more terribly in 1689.

† See his letter in Procopius. See Grotius Lib. III. Cap. XII. Sect. 2. Note 17.

of art, when they over-ran the Roman empire. Though the resentment of the great Gustavus against Maximilian, duke of Bavaria, was entirely just, he rejected with indignation the advice of those who were for demolishing the stately palace of Munich; and took particular care to preserve that admirable structure.

However, if for carrying on the operations of a war, or the works of a siege, there be a necessity for destroying buildings of this nature; there is doubtless a right of so doing. The sovereign of the country, or his general, makes no scruple when reduced to it by necessity and maxims of war. The governor of a town evidently threatened with a siege, sets fire to the suburbs, that they may not be of use to the besiegers for lodging themselves in them. No body offers to blame him who lays waste gardens, vineyards, or orchards, for pitching a camp, or throwing up an intrenchment; if some fine edifice be destroyed thereby, it is an accident, an unhappy consequence of the war, and the general is not at all blameable; unless, without the least inconvenience, he might have made his dispositions elsewhere.

§ 169.
Of bombarding towns.

In bombarding towns it is difficult to spare the fine edifices; at present it is only the ramparts and defences of a place which are usually battered. To destroy a place with bombs and red hot balls is an extremity never practised without great reasons. But it is warranted by the laws of war, when an army has no other resource for reducing a place on which may depend the success of the war, or when it greatly annoys us. It is also sometimes practised when there is no other expedient of facing an enemy to make war with humanity, or for punishing him for some other illegal outrage. But it is with reluctance that good princes make use of their rigorous rights, and never put in extremities. In the year 1694, the English bombarded several maritime towns of France, on account of the great damages done to the British trade by their privateers. But the virtuous and noble-minded consort of William the Third did not receive the news of these exploits with an entire satisfaction. She expressed a sensible concern that war should render such hostilities necessary, adding, "That she hoped both parties would for the future agree on desisting from such odious operations *."

§ 170.
Demolition of fortresses.

Fortresses, ramparts, and every kind of fortification, relate solely to war, and as in a just war nothing is more natural than to raze those which we do not intend to keep, so nothing is more lawful. The enemy is thereby weakened, and no innocent person is involved in the damages. This is the great advantage France has derived from its victories in a war when she did not aim at making conquests.

§ 171.
Of safe-guards.

Safe-guards are allowed to lands and houses intended to be spared, whether from meer favour or with the proviso of a contribution. These consist of soldiers who protect them against

* Histoire du Guillaume III. Liv. VI. Tom. II. page 66.

parties, by producing the general's orders. These soldiers are sacred to the enemy, he cannot use any hostilities towards them, they being there as benefactors, and for the safety of the subjects. They are to be respected in the same manner as an escort appointed to a garrison, or prisoners of war, on their return to their country.

This is sufficient to give an idea of the moderation with which, in the most just war, we are to use the right of pillaging and ravaging the enemy's country, exclusive of the case where an enemy is to be punished; the whole centers in this general rule: All damage done to the enemy unnecessarily, every hostility which does not tend to procure victory, and put an end to the war, is a licentiousness condemned by the law of nature.

But this licentiousness is among nations necessarily unpunished, and tolerated to a certain degree, and how in particular cases shall we determine precisely to what length it was necessary to carry hostilities in order to bring the war to a happy conclusion? And could it be exactly delineated, nations acknowledged no common judge. Each judges of what it has to do in fulfilling its duties. If cause be given for continual accusations of excess in hostilities, this will only multiply complaints, tempers will be more and more inflamed; fresh injuries will be perpetually springing up, and no period put to the war till one of the parties be absolutely destroyed. Therefore nations are reciprocally to observe certain rules; these should be general, independent of circumstances, and the application of them certain and easy. Now, these rules cannot be such unless things be considered in an absolute sense in themselves, and in their natures. Therefore, as with regard to hostilities against an enemy's person, the voluntary law of nations only prohibits such means as are odious, and really unlawful, as poisoning, assassination, treachery, massacring an enemy who has surrendered, and from whom nothing is to be feared; so the same law, in the question now before us, condemns every hostility which of its own nature, and independently of circumstances, contributes nothing to the success of our arms, does not increase our forces, nor weaken those of the enemy. And on the other hand, it permits or tolerates every act, which in itself is naturally adapted to the end of the war, without pausing to consider whether such hostility was requisite, useless, or superfluous in that particular case, unless the exceptions to be made in that case were not absolutely clear. For where there is evidence, the freedom of judgment no longer subsists. So that to ravage or burn a country is not in general against the laws of war. But if an enemy of a much superior strength treats a town or province in this manner, which he might easily keep for procuring to himself an equitable and advantageous peace, he is generally accused of making war like a barbarian. Thus the voluntary destruction of public monuments, of temples, tombs, statues, paintings, &c. is absolutely condemned, even by the voluntary law of nations, as always

§ 173.

General rule of moderating the evil which may be done to an enemy.

§ 174.

Rule of the voluntary law of nations on the same subject.

useless to the lawful end of war. The pillage and destruction of towns, the desolation of the country, ravages, burnings, are not less odious and detested on all occasions, when evidently practised without necessity, or without urgent reasons. But as all these enormities may be excused under pretence of punishment, which the enemy deserves. I shall add, that by the neutral and voluntary law of nations, only enormous offences against it are to be punished in this manner: and when rigour is not of an absolute necessity, it is always beautiful to listen to the voice of humanity and clemency. Cicero condemns the destruction of Corinth for its insults towards the Roman ambassadors; because Rome was able to assert the dignity of its ministers, without carrying its revenge to such extreme rigour.

CHAP. X.

Of faith between Enemies, Stratagems, Artifices in War, Spies, and other Practices.

§ 174.
Faith to be
sacred be-
tween ene-
mies.

THE faith of promises and treaties is the basis of national tranquillity, as we have shewn in an express chapter (Book II. Chap. XV.) It is sacred among men, and absolutely essential to this common safety. Are we then dispensed from it towards an enemy? To imagine that between two nations at war every duty ceases, every tie of humanity is broken, would be an error equally gross and destructive. Men, however reduced to the necessity of taking up arms for their defence, do not therefore cease to be men. They are still subject to the same laws of nature; for otherwise there would be no laws of war. Even he who makes an unjust war on us is still a man, we still owe him whatever this quality requires of us. But a conflict arises between our duties towards ourselves and those which connect us with other men. The law of safety authorises us to attempt, against this unjust enemy, every thing necessary for repelling him, or bringing him to reason. But all those duties, the exercise of which is not necessarily suspended by this conflict, subsist in their full force. They bind us both towards the enemy and towards all others. Now, the obligation of keeping faith is so far from ceasing in time of war, by virtue of the preference which the duties towards ourselves are intitled to, that it becomes more necessary than ever. There are a thousand occasions, even in the course of the war, when for checking its rage, or abating the calamities insupportable from the common interest, the safety of each party requires that they should agree on certain points. What would become of prisoners of war, capitulating garrisons, and towns which have surrendered, if the word of an enemy was not to be relied on? War would degenerate into an unbridled and cruel licentiousness. Its evils would be without bounds, and how could it at length be terminated,

nated, or peace be restored? If faith be banished from among enemies, a war can never terminate with safety, but by the total destruction of one of the parties. The slightest difference, the least quarrel would break out in a war like that of Hannibal against the Romans, in which they fought, not for some province, not for sovereignty or for glory, but for the very being of the nations *. Thus it is certain that the faith of promises and treaties is to be as sacred in war as in peace, among enemies as among friends.

The conventions, the treaties made with a nation, are broken or annulled, by a war arising between the contracting parties; both as they tacitly suppose the state at peace, and because each being impowered to deprive the enemy of what belongs to him, he takes from him those rights which had been given him by treaties. Yet here we must except those treaties where certain things are stipulated in case of a rupture; as the time to be allowed subjects of both sides for withdrawing the neutrality which common consent assured to a province, city, &c. Since by treaties of this nature, intended to provide for what shall be observed in case of a rupture, all right of annulling them by a declaration of war is renounced.

§ 175.
What treaties are to be observed among enemies.

For the same reason, all promises made to an enemy in the course of a war are obligatory. For from the time of our treating with him, whilst the sword is in our hand, there is a tacit, but necessary, renunciation of any power to break the convention, by way of compensation, and on account of the war, as the preceding treaties are broken; otherwise it would be doing nothing, it would be absurd to treat at all with the enemy.

But conventions made during a war are like all other compacts and treaties, of which the reciprocal observation is a tacit condition (Book II. § 202.); we are no longer bound to observe them towards an enemy who has first broken them. And even in two separate conventions, which have no manner of connection; though perfidy is never allowable, because we have to do with an enemy who on another occasion has failed in his word, yet the performance of a promise may be suspended, for obliging him to repair his breach of faith, and what has been promised him may be detained by way of security, till he has made satisfaction for his perfidy. Thus at the taking of Namur in 1695, the king of England caused marshal Boufflers to be put under arrest, and notwithstanding the capitulation, detained him prisoner, for obliging France to repair the infractions of the capitulations of Dixmude and Dainse †.

§ 176.
On what occasion they may be broken.

Good faith consists not only in the observance of promises, but also in not deceiving on occasions, where is the least obligation for speaking truth. We are here engaged in a question

§ 177.
Of it.

* De salute certatum est.

† Histoire de Guillaume III. Tom. II. page 148.

which has been warmly debated; and, while the prevailing notions of a lye wanted accuracy or perspicuity, appeared not a little intricate. Several, and especially divines, have made truth a kind of deity, to which in itself, and independently of its effects, we owe I know not what inviolable respect. They have absolutely censured all discourse contrary to the speaker's sentiment; they have established, that we are on all occasions, where we cannot be silent, to speak according to the known truth, and rather than be wanting in respect to his deity, they have sacrificed the most dear and valuable concerns. But some more clear-sighted philosophers have explained this idea, so confused and false in its consequences. It has been owned that truth in general is to be respected as the soul of society, the basis of confidence in the commerce and intercourse of men; and therefore that a man is not to lye, even in matters of indifference, least he weaken the respect due to truth in general, and injure himself by rendering his word suspected, even when he speaks seriously. But by thus grounding the respect due to truth on its effects, men are led into the right way, and ever since it has been easy to distinguish between the occasions where we are obliged to speak the truth, or declare our thoughts, and those where there is no such obligation. The appellation of lies is given only to the words of a man speaking contrary to his thoughts, on occasions where he is obliged to speak truth. Another name, in Latin *falsiloquium*, is applied to any false discourse to persons who in that particular case are not to be told the truth. These principles being laid down, it is not difficult to indicate what, on occasion, is to be the lawful use of truth or falsity towards an enemy. Whenever we have expressly or tacitly engaged to speak truth, we are indispensibly obliged to it by that faith of which we have proved the inviolability. Such is the case of conventions, or treaties. It is of absolute necessity that there should be in them a tacit engagement, for to say that we do not engage not to deceive the enemy under colour of treating with him would be absurd: it would be mere quibble and chicanery. Truth is also to be told to an enemy on all occasions where we are naturally obliged to it by the laws of humanity; that is, when the success of our arms, and the duties we owe ourselves do not clash with the common duties of humanity, and in the present case suspend their force and exercise. Thus when prisoners, either on ransom or exchange, are sent away, it would be infamous to put them in a dangerous road. Should the prince or the enemy's general enquire after a woman or a child, who is dear to him, it would be scandalous to deceive him.

§ 178.
Of stratagems and
artifices in
war.

But when by leading an enemy into an error, either by a discourse where we are not obliged to speak truth, or by some feint, we can procure ourselves an advantage in the war which it would be lawful to seek by open force; this doubtless is legal. I say further, as humanity obliges us in the pursuit of our rights

to prefer the mildest means, if by stratagem, a feint void of perfidy, we can make ourselves masters of a strong place, surprise the enemy, and overcome him, it is much better, it is really more commendable to succeed in this manner than by a bloody siege, or the carnage of a battle. But the saving of blood is not of such weight as to warrant perfidy, the consequences of which would be infinitely dreadful, and when sovereigns were once embarked in a war, would cut off all means of treating together for restoring peace (§ 174.) Delusions towards an enemy, free from perfidy, either in words or actions, snares laid for him consistent with the rights of war, are stratagems, the use of which have always been acknowledged lawful, and had often a great share in the glory of celebrated commanders. The king of England, William III. having discovered that one of his secretaries sent intelligence to the enemy of every thing, caused the traitor to be secretly put under arrest, and made him write to the duke of Luxemburgh, that the next day the troops would make a general forage, supported by a large body of infantry with cannon. And this artifice he made use of for surprising the French army at Steinkirk, but by the activity of the French general, and the courage of his troops, though the measures were so artfully contrived, the success was not answerable *.

In the use of stratagems we should regard not only the faith due to an enemy, but also the rights of humanity, and avoid doing things the introducing which would be pernicious to mankind. Since the commencement of hostilities between France and England, an English frigate is said to have appeared near Calais, and made signals of distress, with a view of bringing off some vessel, and actually seized a boat and some sailors, who generously came to its assistance. If the fact be so, this unbecoming stratagem deserves a severe punishment. It tends to damp a benevolent charity so sacred to the interests of mankind, and so laudable even among enemies; besides, to make signals of distress is to ask assistance, which certainly promises all kind of the utmost safety to those who give this kindly succour. Therefore the action attributed to this frigate implies an odious perfidy.

Some nations, even the Romans, for a long time professed to despise every kind of artifice, surprize, or stratagem, in war; and others went so far as to send notice of the place and time for giving battle †. In this conduct there was more generosity

* Memoires de Fouquieres. Tom. III. p. 87, &c.

† This was the practice of the antient Gauls. See Livy. It is said of Achilles, that he was for fighting openly, and not of a temper to have made one of those who were shut up in the famous wooden horse, which proved fatal to the Trojans.

Ille non inclusus equo, Minervæ

Sacra mentito, male feriatus

Troas, et lætam Priami choreis

Fellerat Aulani:

Sed palam capis gravis. . . .

Hor. Lib. IV. Odyss. VI.

than discretion. It would indeed be very laudable if, as in the frenzy of duels, the only business was to display personal courage; but a war is made to defend our country, to prosecute by force what is unjustly denied us, and the sure means are also the most commendable, provided they be not unlawful and odious in themselves *. The contempt of artifice, stratagem, and surprize, proceeds often as in the case of Achilles, from a noble confidence in personal valour and strength: and it must be owned that when an enemy may be defeated with open force, in a pitched battle, there are greater hopes of having quelled and reduced him to sue for peace, than if the advantage was owing to surprize; as Livy † makes those generous senators say, who did not approve of the manner of proceeding against Perseus, as not altogether sincere. Therefore, when plain and open courage may secure a victory, there are occasions when it is preferable to artifice, because the advantages gained to the state are more solid and permanent.

§ 179.
Of spies.

The use of spies is a kind of clandestine practice or deceit in war. These find means to insinuate themselves among the enemy, in order to discover the state of his affairs, to pry into his designs, and then give intelligence to him who employs them. Spies are generally punished capitally, and not unjustly; there being scarce any other method to prevent the mischief they do (§ 155). For this reason a man of honour, who would not expose himself to die by the hand of a common executioner, ever declines serving as a spy: he counts it beneath him, as it can scarce be done without some kind of treachery. The sovereign cannot therefore lawfully require such a service from his subjects, unless in some singular case, and that of the last importance. The mercenary are allured to it by great rewards. If those whom a sovereign employs make a voluntary offer, or if they be not the enemy's subjects, or have no connection with him, he may unquestionably make use of their service without offence to justice or honour; but is it lawful, is it decent to solicit the enemy's subjects to act as spies, and betray him? To this the following paragraph may serve as an answer.

§ 180.
Of practices for seducing the enemy's men.

It is asked in general whether it be lawful to seduce the enemy's men, to engage them to transgress their duty by an infamous treachery? Here we must distinguish between what is due to the enemy, notwithstanding the state of the war, and what is required by the internal laws of conscience, and the rules of probability. Now the enemy may be weakened by all possible means, provided they do not affect the common safety of human society, as poison and assassination (§ 155). The seducing of a subject to turn spy, that of a governor to deliver up his place, does not strike at the foundation of the common safety and welfare of society. Subjects acting as the enemy's spies, are not a fatal and inevitable evil, they may in some measure be guarded against,

* Virg. *Æn.* II. v. 30. † Tit. Liv. Lib. XLII. Cap. XLVII.

and as to the security of fortresses, it is the sovereign's concern to chuse proper governors. Thus these means are not contrary to the external law of nations, nor can the enemy complain of them as odious proceedings. Accordingly they are practised in all wars. But are they just and compatible with the laws of a pure conscience? Certainly no. And of this the generals themselves are sensible, as they are never heard to boast of having practised them. Seducing a subject to betray his country, suborning a traitor to set fire to a magazine, practising on the fidelity of a governor, inticing him, persuading him to deliver up a place, is prompting such persons to commit detestable crimes. Is it honest to incite our most inveterate enemy to be guilty of a crime? If such practices are at all excuseable, it can be only in a very just war, and for saving our country, when threatened with ruin by a lawless conqueror. The guilt of a subject or general who betrays his prince in a cause manifestly unjust, does not appear so very odious. He who himself tramples upon justice and probity deserves in his turn to feel the effects of perfidy and wickedness. And if ever it is excuseable to depart from the strict rules of probity, it is against such an enemy, and in such an extremity. The Romans, whose ideas concerning the rights of war, were so pure and elevated, did not approve of such dark practices; made no account of the consul Cæpio's victory over Viriatus, because it had been purchased. Valerius Maximus says that it was stained with a double perfidy* and another historian says, that the senate did not approve of it†.

It is a different thing merely to accept of the offers of a traitor. We do not seduce him, and though we detest his crime, we serve ourselves. Transfugers and deserters commit a crime against their sovereign; yet according to the Roman civilians they are received by the law of war‡. If a governor sells himself, and offers for a sum of money to deliver up his town, shall we scruple to take advantage of his crime, and to obtain without danger what we have a right to take by force? But when we know ourselves able to succeed without the assistance of traitors, it is noble to reject their offers with detestation. The Romans in their heroic ages, in those times when they used to give such illustrious examples of magnanimity and virtue, ever expressed their abhorrence of any advantages offered them by any treacherous subjects of the enemy. They not only acquainted

§ 181.

Whether the offers of a traitor may be accepted.

* Viriati etiam cædes duplicem perfidiæ accusationem recepit: in amicis quod eorum manibus interemptus est: in Q. Servilli Cæpione consule; quia is sceleris huius auctor, impunitate promissa, fuit: victoriamque non meruit sed emit. Lib. IX. Cap. 6. num. 4. Though this instance seems to regard another point (assassination) yet according to other authors, it does not appear that Cæpio had practised with Variatus's soldiers, to assassinate him. Among others see Eutropius, Lib. 4. Cap. VIII.

† Que victoria quia emptæ erat, a senatu non probata. Auctor. de Viris illustr. Cap. LXXI.

‡ Transfugam jure belli recipimus, Digest. L. 41. Titul. 1. de Acquir. Rer. Dom. leg. 51.

Pyrrhus with the atrocious design of his physician, but likewise refusing to avail themselves of a lesser crime, sent back, bound to the Falisci, a traitor who had offered to deliver up the king's children*.

But when the enemy is at variance we may very lawfully hold a correspondence with one of the parties, and make use of the right, which it judges to have, of hurting its adversary. Thus we promote our own affairs without seducing others, or being in anywise partakers of their guilt. If we take advantage of his error, this is doubtless allowable against an enemy.

§ 182.
Of deceitful intelligence.

A deceitful intelligence is that of a man who feigns to betray his own party with a view of drawing the enemy into a snare. This, when done deliberately, and by making the first advances, is treachery, and an infamous practice; but an officer or governor of a place, when tampered with by the enemy, may very lawfully, on certain occasions, with a view of deceiving the seducer, seem to lend an ear to the proposal; an injury was offered to him by tempting his fidelity; and to draw the deceiver into the snare is no more than a just revenge. By this conduct he neither hurts the faith of promises nor the welfare of mankind; for criminal engagements are absolutely null, and never to be fulfilled; and it would be well if the promises of traitors could not be relied on, that they were on all sides surrounded with uncertainties and dangers. Therefore a superior, on information that the enemy's is tempting the fidelity of an officer or foldier, makes no scruple of ordering this subaltern to feign himself gained over, and to model his pretended treachery so as to draw the enemy into an ambuscade; the subaltern is obliged to obey. But if the seduction be practised immediately on the commander in chief, a man of honour chuses, as he ought, to reject an injurious offer openly, and with indignation.

C H A P. XI.

Of a Sovereign's making an unjust War.

§ 183.
An unjust war gives no manner of right.

ALL the right of a power to make war is derived from the justice of his cause. The unjust party who attacks or threatens him, or withholds what belongs to him, in a word, who does him an injury, lays him under the necessity of defending himself, or of doing himself justice, sword in hand; he authorises him in all the acts of hostility necessary for procuring a compleat satisfaction. Whoever therefore takes arms without a lawful cause can absolutely have no kind of right; all the hostilities he commits are unjust.

* Eadem fide indicatum, Pyrrho regi medicum, vite ejus insidiantem: eadem Faliscis vinctum traditum preditorem liberorum regis. Tit. Liv. Lib. XLII. Cap. XLVII.

He is chargeable with all the evils, all the horrors of the war; all the effusion of blood, the desolation of families, the rapine, the violences, the ravages, the burnings, are his works and his crimes. He is guilty towards the enemy, of attacking, oppressing, massacring them without cause; guilty towards his people, of drawing them into acts of injustice, exposing their lives without necessity, without reason, towards that part of his subjects whom the war ruins, or who are great sufferers by it, of losing their lives, their fortune, or their health. Lastly, he is guilty towards all mankind, of disturbing their quiet, and setting a pernicious example. Shocking catalogue of miseries and crimes! dreadful account to be given to the King of Kings, to the common Father of men! May this slight sketch strike the eyes of the conductors of nations, princes, and their ministers. Why may not we expect some benefit from it, are the great lost to all sentiments of humanity and honour, of duty and religion? And should our weak voice throughout the whole succession of ages prevent a single war only, how gloriously would our labour be rewarded.

He who does an injury is bound to repair the damage, or to make a just satisfaction, if the evil be not irreparable, and even to penalty, if penalty be necessary by way of example, for the safety of the party offended, and also for that of human society. This is the case of a prince who is the author of an unjust war. He is to restore whatever he has taken, send back the prisoners at his own expence; he is to make compensation to the enemy for the injuries and losses he brought upon him; to relieve destitute families, and, was it possible, to repair the loss of a father, a son, or a husband.

But how can he repair so many injuries? Many are in their own nature irreparable. And as to those which may be compensated by an equivalent, when shall the unjust sovereign raise a sufficiency for expiating his violence? The prince's personal wealth will not answer the demand; shall he give away that of his subjects, which does not belong to him? Shall he sacrifice the national lands, a part of the state? But the state is not his patrimony (B. I. § 61.) He cannot dispose of it at will. And however the nation be, to a certain point, bound to its conductor; besides the injustice of punishing it directly for faults of which it is not guilty, if it is bound by the sovereign's acts, it is only towards other nations which have their recourse against it (Book I. § 40. Book II. § 81, 82.) The sovereign cannot throw on it the penalty of his violences, nor strip it to repair them. And was it in his power, would this clear him of every thing? Would his conscience be pure though acquitted towards the enemy? Is he so to his people? It is a strange kind of justice to repair injuries at the expence of a third person; this is no more than changing the object of his injustice. Weigh all these things ye conductors of nations! and having clearly seen that an unjust war

§ 184.
Great guilt
of the so-
vereign
who under-
takes it.

§ 185.
His obliga-
tions.

§ 186.
Difficulty
of repairing
the injury
he has done.

war

war draws you into a multitude of iniquities, which all your power cannot repair, it is to be hoped that you will be less hasty to engage them.

§ 137.
Whether
the nation
and the mi-
litary are
bound to
any thing?

The restitution of conquests, of prisoners, and of such effects which may be found again, admits of no difficulty on the injustice of the war being acknowledged. The nation aggregately, and private persons knowing the injustice of their possession, are to restore every thing which has been wrongfully acquired. But as to the reparation of any damage, are the military, generals, officers, and soldiers, in conscience obliged to repair the injuries which they have done; not from any ill-will of their own, but as instruments in the hands of their sovereign? I am surprised that the judicious * Grotius should, without distinction, hold the affirmative; it is a decision which cannot support itself, but in the case of a war so palpably, so indisputably unjust, that it admits of no secret reason of state, or any other capable of justifying it; a case in politics almost impossible. On all occasions susceptible of doubt, the whole nation, the individuals, and especially the military, refer it to those who govern, to the sovereign, and are obliged to it by essential principles of political society and of government. How could public affairs be carried on, if at every step of the sovereign the subjects were to weigh his reason? If they could refuse to march for a war, concerning which they had any scruple. Prudence sometimes does not admit that a sovereign should make known all his reasons. It is the duty of subjects to suppose them just and wise, while a full and absolute evidence does not tell them to the contrary. When therefore in such thoughts they have lent their assistance in a war, which afterwards is found to be unjust, the sovereign alone is guilty. He alone is bound to repair the injuries. The subjects, and in particular the military, are innocent, they have acted only from a necessary obedience. They are only to deliver up what they have acquired in such a war, as having no lawful title to possession. This I believe to be almost the unanimous opinion of honest men, and of those officers who distinguish themselves by their honour and probity. Their case here is that of all those who are the executors of the sovereign's orders. Government would be impracticable if every one of its instruments was to weigh its commands, and thoroughly canvass their justice before they obeyed them. But if, for the welfare of the state, they are to suppose the sovereign's orders to be just, they are not responsible for them.

* Grotius, de Jure Bell. et Pac. Lib. III. Cap. X.

C H A P. XII.

Of the voluntary Law of Nations, as it regards the Effects of a War in Form, independently of the Justice of the Cause.

ALL we have said in the preceding chapter is a consequence of the true principles of the eternal rules of justice. They are the dispositions of that sacred law which nature, or its divine author, has prescribed to nations. He alone whom justice and necessity have armed, has a right to make war; he alone is empowered to attack his enemy, deprive him of life, and wrest from him his goods and possessions. Such is the decision of the law of nations, or of the law of nature, to the observation of which nations are strictly bound (Prelim. § 7) It is the inviolable rule which each is conscientiously to follow. But in the contest of nations and sovereigns who live together in a state of nature, how can this rule be asserted? They acknowledge no superior. Who then shall be judged between them, for assigning to each his rights and obligations? Who shall say to this, you are in the right to take up arms, to fall on him, and reduce him by force? Or to the other, all the hostilities you commit will be unjust. Your victories will be so many murders, your conquests rapines and robberies. Every free and sovereign state has a right of determining according to the dictates of conscience what its duties require from it, and what it can or cannot do with justice (Prelim. § 16.). Others in taking on themselves to judge of this, invade its liberty; they hurt it in its most valuable rights (Prelim. § 15.) and then each declaring justice to be on its side, will arrogate to itself all the rights of war, and pretend that its enemies have none, that his hostilities are so many robberies, so many infractions of the law of nations, in the punishment of which all states should unite. The decision of the law and the controversy is so far from being forwarded by it, that the quarrel will become more bloody, more calamitous in its effects, and also more difficult to terminate. Nor is this all; the neutral nations themselves will be drawn into the dispute, and thus entangled in the quarrel. If an unjust war cannot do any thing with propriety, while an acknowledged judge, and among nations there is none such, has not definitely pronounced concerning the justice of the war, there can be no certain possession of things taken in war; they will always be liable to be claimed, as effects carried off by robbers.

Let us then leave the strictness of the law of nature to the conscience of sovereigns; they are doubtless never to deviate from it; but as to the external effects of the law among men, we must necessarily have recourse to rules of a more certain and easy application; and this for the very safety and advantage of the great society of mankind. These are the rules of the voluntary

§ 138.

That nations cannot insist on the strictness of the law of nature towards each other.

§ 139.

Why the voluntary law of nations is to be admitted among men.

tary

tary law of nations (Prelim. § 21.) The law of nature, whose object is the greatest good of human society, which protects the liberty of every nation, which requires that the misunderstandings of sovereigns should be carried to an issue, that their quarrels should be terminated and brought to a speedy period. This law, I say, recommends the observance of the voluntary law of nations for the common advantage of states, in the same manner as it approves of the alterations made in the rules of the law of nature by the civil law, with a view of rendering men more suitable to the state of political society, and of acquiring a more easy and certain application. Let us therefore apply to the particular subject of war, the general observation in our preliminary (§ 28.) A nation or a sovereign, when deliberating on what measures its duties prescribe, is never to lose sight of the *necessary* law, whose obligation on the conscience is inviolable. But in examining what it can require from other states, it owes a deference to the voluntary law of nations, and even should limit its just claims by the rules of a law, the maxims of which have for their object the happiness and advantage of the universal society of nations. Though the *necessary* law be its invariable rule, with regard to itself, it must allow others to avail themselves of the *voluntary* law of nations.

§ 196.
A war in
form, as to
its effects,
is to be
accounted
just on both
sides.

The first rule of this, in the point before us, is, that a war *in form, as to its effects, is to be accounted just on both sides*. This is absolutely necessary, as we have just shewn, for introducing some order and rule into so violent an operation as that of arms, for limiting the calamities of which it is productive, and that a door may always be left open for the return of peace. It is even impracticable for nations to act otherwise among themselves, as they acknowledge no judge. Thus the rights, founded on the state of war, the lawfulness of its effects, the validity of the acquisitions made by arms, do not externally and among men depend on the justice of the cause, but on the legality of the means in themselves; that is, on every thing requisite to constitute a *war in form*. If the enemy keeps to all the rules of a war in form (Book III. Chap. IV.) we are not entitled to complain of him as a violator of the law of nations. He has the same pretences to right as we have ourselves; and all our resource lies in a victory, or an accommodation.

§ 197.
Whatever
is permitted
to one,
is so to the
other.

Second rule. The war being reputed equal between two enemies, *whatever is permitted to one, in virtue of the state of war, is also permitted to the other*. Accordingly no nation, under pretence of justice being on its side, ever complains of the hostilities of the enemy, while they observe the terms prescribed by the common laws of war. We have, in the foregoing chapter, treated of what is allowable in a just war. It is precisely that, and no more, which the voluntary law equally authorises in both parties.

This law puts things between both on a parity, but allows to neither what is in itself unlawful; it can never countenance a
wild

wild licentiousness. If therefore nations transgress these bounds, if in support of a just cause they carry hostilities beyond what the internal and necessary law permits in general, far be it from us to charge these excesses on the voluntary law of nations, they arise solely from a depravation of manners, which produces an unjust and barbarous custom; such are those horrid enormities sometimes committed by the soldiers in a town taken by storm.

We are never to forget that this voluntary law of nations, which is admitted from necessity, and to avoid greater evils, (§ 188, 189.) *does not give to him whose arms are unjust a genuine right, capable of justifying his conduct, and acquitting his conscience, but only the external effect of the law and impunity among men.* This sufficiently appears by what we have said in establishing the voluntary law of nations. The sovereign whose arms are not authorised by justice, is not thereby the less unjust, nor less guilty against the sacred law of nature, though not to invenom the evils of human society, when it would prevent them, the law of nature itself requires, that he should be permitted to have the same external rights as justly belong to his enemy. In the same manner, he may, by the civil law, refuse to pay his debts in case of prescription; but he then offends against his duty; he takes advantage of a law enacted for preventing the increase of vexatious suits, but he is not founded on any genuine right.

§ 192.
Voluntary law gives no more than impunity to him who makes an unjust war.

Nations being actually agreed in the observance of the rules, which we attribute to the voluntary law of nations, Grotius founds them on an open consent in the people, and attributes them to the arbitrary law of nations. But, besides the difficulty which would often occur in proving such engagement, it would be of force only against those who had formerly entered into it; did such an engagement exist, it would relate to the conventional law of nations, which, as proved by history, not from reasoning, is founded on facts, and not on principles.

In this work we lay down the natural principles of the law of nations. We deduce them from nature itself: and what we call the voluntary law of nations consists in rules of conduct, external right, to which the law of nature requires the consent of nations. So that there is a right of supposing their consent without seeking for it in the annals of the world; for had they not given it, the law of nature supplies that want, and gives it for them. Here nations are not free in their consent; to refuse it would be hurting the common right of nations (Prelim. § 21.)

This voluntary law of nations, once established, is of very extensive use, and is far from being a chimera, an arbitrary or groundless fiction. It flows from the same source, and is founded on the same principles, with the *neutral and necessary law*. Wherefore does nature prescribe such and such rules of conduct to men? Because those rules are necessary to the safety and welfare of mankind. But the maxims of the necessary law of nations are founded immediately on the nature of things, and particularly

particularly on that of men, and political society. The *voluntary* law of nations supposes a farther principle, the nature of the grand society of nations, and their mutual intercourse. The former enjoins to nations what is absolutely necessary and naturally tends to their perfection and common happiness. The latter tolerates what cannot be avoided, but by introducing greater evils.

CHAP. XIII.

Of Acquisitions by War, and particularly of Conquests.

§ 193.
How war
is a method
of acquisition.

IF it be lawful to carry off things belonging to an enemy, with a view of weakening him, (§ 160.) and sometimes of punishing him (§ 162.) it is no less lawful in a just war to appropriate to ourselves those things by a kind of compensation, which the civilians term *expletio juris* (§ 161.) They are detained as an equivalent for what is due by the enemy, for the expences and damages which he has occasioned, and even when there is cause of punishing him, instead of the penalty which he has deserved. For when I cannot procure to myself the individual thing which belongs or is due to me, I have a right to an equivalent; which, by the rules of *expletive justice*, and according to moral estimate, is considered as the thing itself. Thus war founded on justice is according to the law of nature, which constitutes the necessary law of nations, a just method of acquisition.

§ 194.
Measure of
the right it
gives.

But this sacred law authorises the acquisition made by just arms, only within the limits of justice; that is, as far as a complete satisfaction in the measure necessary for answering the lawful ends we have just mentioned. An equitable conqueror, instead of being swayed by ambition and avarice, will make a just estimate of what is due to him; that is, of the very thing which has caused the war; and if the thing itself is not to be procured, of the damages and expences of the war, or will detain no more of the enemy's goods than is precisely the equivalent. But if he has to do with a perfidious, restless, and dangerous enemy, he will by way of penalty deprive him of some of his towns or provinces, and keep them as a barrier. Nothing is more allowable than to weaken an enemy who is become formidable, and has rendered himself suspected. The lawful end of the penalty is future security. These are conditions which render an acquisition, made by arms, just and irreproachable before God and our own conscience; justice in the cause, and equity in the satisfaction.

§ 195.
Dispositions
of the
voluntary
law of na-
tions.

But nations cannot among themselves insist on this rigid justice. By the dispositions of the voluntary law of nations, every war in form, as to its effects, is considered as just on both sides (§ 190.). And there is no right of judging a nation with

regard

regard to the excess of its claims, or from what it believes necessary to its safety. (Prelim. § 21.) Therefore, by the voluntary law of nations, every acquisition obtained by a war in form is valid, independently of the justice of the cause, and the reasons which the conqueror may have for attributing to himself the property of what he has taken. Accordingly among nations conquest has been deemed a lawful title, and has seldom, if ever, been disputed, unless owing to a war not only unjust but even void of pretences.

The property of moveable commodities belong to the enemy, § 196. is required the very moment they come into his power, and if he Acquests of moveables, sells them to neutral nations, the first owner has no right of reclaiming them. But such things must be actually and truly in the enemy's power, and carried to a place of safety. A foreigner coming into our country buys a portion of the booty just taken by a party of the enemy; our men who are in pursuit of this party very justly seize on this booty, which the foreigner was over precipitate in buying. On this head Grotius relates from Thuanus, the instance of the town of Lierre in Brabant, which having been taken and retaken on the same day, the booty was restored to the inhabitants, because it had not been twenty-four hours in the enemy's hands *. This space of twenty-four hours, together with the custom at sea †, is an institution of the pactitious law of nations, or of custom, or, in fine, of a civil law in some states. The natural reason of the conduct towards the inhabitants of Lierre is, that the enemy being taken as it were in the fact, and before they had carried off the booty, it was accounted as not having become absolutely their property; or as lost to the inhabitants. Thus, at sea, a ship taken by the enemy, while it has not been carried into some harbour, or into the midst of a fleet, may happen to be retaken, and delivered by ships of the same party: its fate is not decided, nor the owner's property irrecoverably lost, till the ship be in a place of safety with regard to the enemy, who has taken it, and entirely in his power. But the ordinances of every state may make other regulations among its citizens ‡, both from avoiding disputes and encouraging ships of force to recover merchant-ships after being taken by the enemy. The justice or injustice of the cause here does not come into account. There would be nothing stable among men, no safety in trading with nations which are at war, if such a distinction could be made between a just and unjust war, as to attribute lawful effects to the one, which were denied to the other: it would be opening a door to endless discussions and quarrels. This reason is of such weight, that, on account of it, the effects of a public war, at least with regard to moveables, have been allowed to expeditions, which deserved no other name than robberies, but were carried on by arms in form.

* Grotius de Jure Bell. & Pac. Book III. Cap. VI. Sect. 3. n. 7.

† See Grotius ibid. and in the text. ‡ Grotius ibid.

When, after the wars of the English in France, the *grandes compagnies* ranged about Europe, sacking and pillaging wherever they came, we do not hear that any one claimed the booty which they had carried off and sold. At present it would be in vain to claim a ship taken by the Corsairs of Barbary, and sold to a third party, or retaken from them; though it is very improperly that the piracies of these barbarians can be considered as acts of a war in form. We here speak of the external right; the internal right and conscience doubtless require that we should restore to a third party the goods we recover from an enemy, who in an unjust war had taken them from him; provided he knows these things again, and defrays the expences we were at in recovering them *. Grotius recites many instances of sovereigns and commanders who have generously restored such booty, without requiring any thing either for their trouble or expence. But this only regards a recent booty. To find out the proprietors of what had been taken long before, would be scarce practicable, and besides they have relinquished all their rights to things which they had no longer any hopes of recovering. This is the common way of thinking with respect to captures in war, which are soon given up as irrecoverably lost.

§ 197.
Of the acquisition of immovables, or of conquest.

Immoveables, lands, towns, provinces, &c. pass under the power of the enemy who makes himself master of them; but it is only by the treaty of peace, or the entire submission and extinction of the state, to which these towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect.

§ 198.
How to transfer them validly.

Thus a third party cannot safely purchase a conquered place or province, till the sovereign from whom it was taken has by a treaty of peace renounced it, or being irrecoverably reduced, has forfeited its sovereignty; for while the war continues, while the sovereign has still hopes of recovering his possessions by arms, is a neutral prince to come and deprive him of such liberty by purchasing of the conqueror this place or province? The first proprietor cannot forfeit his rights by the action of a third person, and if the purchaser is for maintaining his purchase, he will find himself engaged in a war. Thus the king of Prussia put himself among the enemies of Sweden, by receiving Stettin from the hands of the king of Poland, and the czar, under the title of sequestration †. But when a sovereign has, by a definitive treaty of peace, ceded a country to the conqueror, he has relinquished all the right he had to it, and it would be an absurdity were he allowed to claim this country again from a fresh conqueror, who wrests it from the former, or of any other prince, who has acquired it by money, exchange, or any title whatever.

* Grotius Lib. III. Cap. XVI.

† By the treaty of Schwedt, 6 Oct. 1713.

A prince taking a town or province from his enemy; can justly acquire over it the same rights only as belonged to the sovereign against whom he had taken arms. War authorises him to possess himself of what belonged to his enemy: if he deprives him of the sovereignty of a town or province, he acquires it as it is, with all its limitations and modifications. Accordingly, care is usually taken to stipulate both, in particular capitulations and treaties of peace, that the towns and countries ceded shall retain all their liberties, privileges, and immunities. And why should the conqueror suppress them on account of his quarrel which he had with the sovereign of those places? Yet, if the inhabitants have incurred any personal guilt towards him by any irregularity, he may, as a penalty, deprive them of their rights and privileges. This he may also do if the inhabitants have taken up arms against him, and thus rendered themselves his enemies. All that he then owes them is no more than what is due from a humane and equitable conqueror, to his subdued enemies. Should he purely and simply incorporate them with his former states, they have no cause of complaint.

§ 199.
Of the condition on which a conquered town is acquired.

It appears that hitherto I speak of a city or a country which is not simply a part of a nation, or which does not fully belong to a sovereign, but over which this nation or this sovereign has certain rights; if the conquered town or province was fully and perfectly made part of the demesne of a nation or sovereign, it passes on the same footing into the power of the conqueror. From that time it is united with the new state to which it belongs; if it be a loser by this change, it can only complain of the fortune of war. Thus a town which made part of a republic, or a limited monarchy, and enjoyed a right of sending deputies to the supreme council or to the general assembly of the states, must never more think of such privileges; they are what the constitution of the new state to which it is annexed does not permit.

Formerly in conquests, even individuals lost their lands, and it is not at all strange that in the first ages of Rome such custom should have prevailed. The wars of that æra were carried on between popular republics and communities. The state possessed very little, and the quarrel was in reality the common cause of all the citizens. But at present war is less terrible to the subject; things are transacted with more humanity: it is against one sovereign that another makes war, and not against the quiet subjects. The conqueror lays his hands on the possessions of the state, on what belongs to the public, while private persons are permitted to retain theirs. They suffer but indirectly by war; and to them the result is that they only change masters.

§ 200.
Of the lands of private persons.

But if the whole state be conquered, if the nation be subdued, in what manner can the victor treat it, without transgressing the bounds of justice? What are his rights over the conquest? Some have dared to advance this monstrous principle, that the

§ 201.
Of the conquest of the whole state.

conqueror is absolute master of his conquest, that he may dispose of it as his property, treat it as he pleases, according to the common expression of *treating a state as a conquered country*: and hence they derive one of the sources of despotic government. But enough of those who reduce men to the state of transferable goods, or use them like beasts of burthen, who deliver them up as the property or patrimony of another man: let us argue on principles countenanced by reason, and becoming humanity. The whole right of the conqueror proceeds from the just defence of himself (§ 3, 26, 28.) which contains the support and prosecution of his rights. Thus when he has totally subdued a nation with whom he had been at war, he may without dispute cause justice to be done him, with regard to what gave rise to the war, and require payment for the expence and damage he has sustained; he may, according to the exigency of the case, impose penalties on it, as an example; he may, should prudence so dictate, disable it from undertaking any pernicious designs for the future. But in securing all these views, the mildest means are to be preferred. We are always to remember, that the law of nature permits no injury to be done to an enemy, unless in taking measures necessary for a just defence, and a reasonable security. Some princes have only imposed a tribute on it, others have been satisfied with stripping it of some privileges, dismembering a province, or keeping it in awe by fortresses; others, as their quarrel was only with the sovereign in person, have left a nation in the full enjoyment of all its rights, only setting a sovereign over it. But if the conqueror thinks proper to retain the sovereignty of the vanquished state, and has such a right, the manner in which he is to treat the state still flows from the same principles. If the sovereign be only the just object of his complaint, reason declares, that by his conquests he acquires only such rights as actually belonged to the dethroned sovereign; and, on the submission of his people, he is to govern it according to the laws of the state. If the people do not voluntarily submit, the state of war subsists.

A conqueror who has taken arms, not only against a sovereign, but against a nation itself, whose intent was to subdue a lawless people, and once for all reduce an obstinate enemy; this conqueror may with justice lay burdens on the conquered, both as a compensation for the expence of the war, and as a penalty. He may, according to the degree of idocility, govern them with firmness and rigour, for dispiriting and weakening them; and, if necessary, keep them some time in a state of slavery. But this forced condition is to cease when the danger is over, when the conquered are become citizens; for then the right of the conqueror, as to severities, expires; as his defence and safety no longer require such extraordinary precautions. In fine, every thing is to be reduced to the rules of a wise government, to the duties of a good prince.

When

When a sovereign, as pretending to have the absolute disposal of a people whom he has conquered, is for enslaving them, he causes the state of war to subsist between this people and him. The Scythians said to Alexander the Great, there is never any friendship between the master and slave. In the midst of peace the right of war still subsists*. Should it be said, that in such a case there may be peace, and a kind of compact, by which the conqueror grants life, on condition that they acknowledge themselves his slaves: he who says so, is ignorant that war gives no right to take away the life of an enemy, after being disarmed and subdued (§ 140.) But I shall decline to debate this principle of jurisprudence with him; let him take it to himself; he deserves such a subjection. But men of spirit, to whom life is nothing, less than nothing, unless sweetened with liberty, will always conceive themselves at war with that oppressor, though on their part the acts are suspended by inability. Let us farther say, that if the conquest is to be really subject to the conqueror, as to its lawful sovereign, he must rule it according to the ends for which civil government is established: the prince alone usually occasions the war, and consequently the conquest. Surely it is enough that an innocent people suffer the calamities of war; must even peace itself become pernicious to it? A generous conqueror will apply himself to relieve his new subjects, to alleviate their condition; he will think it his indispensable duty. *Conquest*, says an excellent man, *to clear itself with human nature, always leaves an immense debt behind it*†. Happily, sound politics, here and every where else, coincide with humanity. What fidelity, what assistance, can be expected from an oppressed people? That your conquest may be a real addition to your strength, that it may be well affected to you, treat it as a father, as a true sovereign. I am charmed with the generous answer of the ambassador from Privernum, who, on being introduced to the Roman senate, the consul said, "If we shew you clemency, what stress may we lay on the peace you are come to ask?" The ambassador replied, "If you grant it on reasonable conditions, it will be safe and permanent, otherwise it will not last long." Some took offence at the boldness of this speech, but the more sensible part approved of the Privernican's answer, as having spoken like a man, and a freeman. Can it be expected, said these wise senators, that any people, or even private persons, will continue in a condition with which they are dissatisfied, longer than while under an invincible necessity? if they to whom you give peace receive it voluntarily, it may be relied on: what fidelity can you hope for from those whom you are for reducing to slavery‡? The

* Inter dominum et servum, nulla amicitia est, etiam in pace, belli tamen jura servantur. Q. Curt. Lib. VII. Cap. VIII.

† Montesquieu, in his Spirit of Laws

‡ Quid si penam (inquit consul) remittimus vobis, quale n. nos pacem vobiscum habituros speremus? Si bonam dederitis, inquit, et si dam. et perpetuam, si malam haud

The most secure dominion, said Camillus, is that which is acceptable even to those over whom it is exercised*. Such are the rights which the law of nature gives to the conqueror, and the duties which it lays on him; the manner of exerting the one, and fulfilling the other, varies according to circumstances. In general, he is to consult the true interest of the state, and by sound policy, reconcile it, as far as possible, with that of his conquest. He may, in imitation of the kings of France, unite and incorporate them with his state. This was the way of the Romans, but they proceeded differently, according to cases and junctures. At a time when Rome stood in need of augmentation, she destroyed the city of Alba, as a rival; but received the inhabitants into her bosom, and thereby procured herself so many citizens. Afterwards, the conquered cities were left standing, and the freedom of Rome was given to the conquered. Victory could not have been of so much advantage to those people as a defeat.

The conqueror may likewise simply put himself in the place of the sovereign, whom he has dispossessed, as the Tartars have done with China. The empire subsists as it was, except being governed by a new race of sovereigns.

Lastly, the conqueror may rule his conquest as a separate state, and permit the form of government to remain; but this method is dangerous; it produces no real union of force; it weakens the conquest without strengthening the conquered state.

§ 202.
To whom
the con-
quest be-
longe.

It is asked to whom the conquest belongs; to the prince who has made it, or to the state? This question ought never to have been heard of. Can the sovereign act as such for any other end than the good of the state? Whose are the forces employed in the war, even if he had made the conquest at his own expence, out of his own revenue, or his proper and patrimonial estates? does he not make use of his subject's arm? Is it not their blood that is shed? But even suppose that he had employed foreign or mercenary troops, does he not expose his nation to the enemy's resentment? does he not draw it into the war, while the advantage shall be his only? Is it not for the cause of the state, and of the nation, that he takes arms? therefore all the rights proceeding from it appertain to the nation. If the sovereign makes war for a cause personal to himself, as to ascertain a right of succession to a foreign sovereignty, the question is altered. This affair is foreign to the state; but then the nation should be at liberty either to assist its prince, or not concern itself. If he is impowered to make use of the national force in support of his personal

haud diuturnam. Tum vero minari, nec id ambigue Privernatem quidam, et illis vocibus ad rebellandum incitari pacatos populos. Pars melior senatus ad meliora responsa trahere, et dicere viri, et liberi vocem auditam: aut credi posse ullum populum, aut hominem denique in ea conditione cuius cum paniteat, diutius quam necesse sit mansurum? ibi pacem esse fidem ubi voluntarii pacati sint. Neque eo loco ubi servitutem esse velent, fidem sperandam esse. Tit. Liv. Lib. VIII. Cap. XXI.

* Certi ut firmissimum longi imperium est quo obedientes gaudent. Tit. Liv. Lib. VIII. Cap. XIII.

rights,

rights, such rights are no longer to be distinguished from those of the state. The French law, which annexes to the crown all acquisitions made by the king, should be the law of all nations.

We have seen (§ 196) that a nation may be obliged, if not externally, yet in conscience, and by the laws of equity, to restore the booty recovered from an enemy to a third party, who had been deprived of it in an unjust war. The obligation is more certain and more extensive, with regard to a people whom our enemy had unjustly oppressed. For a people thus spoiled of its liberty, never depart from the hope of recovering it, if not voluntarily incorporated with the conquering state; if it has not freely assisted against us in the war, the use we are to make of our victory is, not that it shall only come under a new master, but its chains shall be broken. To deliver an oppressed people is a noble point of victory, and thus to acquire a faithful friend is a great gain. The canton of Schwitz having wrested the county of Glaris from the house of Austria, restored the inhabitants to their former liberties; and on the reception of them into the Helvetic confederacy, Glaris formed the sixth canton *.

§ 203.
Whether we are to set at liberty a people whom the enemy had unjustly conquered?

C H A P. XIV.

Of the Right of Postliminium.

THE right of postliminium is that in virtue of which persons and things taken by the enemy, are restored to their former state, when coming again under the power of the nation to which they belonged.

§ 204.
Definition of the right of postliminium.

The sovereign is obliged to protect the person and goods of his subjects, and to defend them against the enemy; therefore, when a subject, or any part of his substance, are fallen into the hands of the enemy, should any fortunate event bring them again into the sovereign's power, it is certainly incumbent on him to restore them to their former state; he is to re-establish the persons in all their rights and obligations, to give back the effects to the owners; in a word, to settle every thing as they were before they fell into the enemy's hands. The justice or injustice of the war makes no difference here, not only because, according to the voluntary law of nations, the war, as to its effects, is reputed just on both sides, but likewise because war, whether just or not, is a national cause; and if the subjects fighting, or suffering for it, when fallen themselves (or their effects), into the enemy's hands, are by some fortunate incident returned under the power of their own nation, there is no reason why they should not be restored to their former condition. It is as if they had never

§ 205.
Foundation of this right.

* Histoire de la Confédération Helvétique, par M. Watterwilli, Lib. III. under the year 1351.

been taken. If the war be just, they were unjustly taken, and thus nothing is more natural than to restore them as soon as it becomes possible. If the war be unjust, they are not bound to bear the calamities of it more than any other part of the nation. The evil falls on them in being taken, and by their escape or release are delivered. Here again it is as if they never had been taken; neither their sovereign nor the enemy have any particular right over them. The enemy has lost by one accident what they had gained by another.

§ 206.
How it
takes place.

Persons return, and things are recovered, by the right of postliminium, when after being taken by the enemy, they come again under the power of their own nation (§ 204.) Thus this right takes place, as soon as such persons or things taken by the enemy fall into the hands of soldiers belonging to the same nation, or are brought back to the army, the camp, their sovereign's territories, or the places under his command.

§ 207.
Whether it
takes place
among the
allies?

They who join with us in a war, make but one party, jointly with us; the cause is common, the right one and the same; they are considered as making but one body with us. Therefore when persons or things taken by the enemy are retaken by our allies, or our auxiliaries, or in any other manner fall into their hands, this is exactly the same thing with regard to right, as if they were come again into our own power, the power of our allies being in this case but one and the same. The right of postliminium therefore takes place in the hands of those who join with us in the war; the persons and things recovered by them from the enemy are to be restored to their former condition.

But does this right take place in the territories of our allies? Here a distinction arises, whether these allies make one common cause with us; whether they are associates in the war. The right of postliminium necessarily takes place for us within their territories, no less than within our own. For this state is united with ours, and in this war makes one and the same party. But if, as in our times is frequently the practice, an ally only furnishes us the succours stipulated in the treaties, without coming to a rupture with our enemy, their two states continuing in their immediate relations to observe the peace, then only these auxiliaries sent by him are partakers and associates in the war. His dominions adhere to their neutrality.

§ 208.
Of no va-
lidity in
neutral na-
tions.

Now the right of postliminium is of no force among neutral nations; for the power inclined to remain neuter in a war must look on it, as to the effects, equally just on both sides, and consequently to consider whatever is taken by either, a lawful acquisition. To allow in his dominions that one may claim things taken by the other, or to grant him the right of postliminium, in prejudice to the other, would be to declare in his favour, and depart from the neutrality.

§ 209.
What
things are
recoverable
by this
right.

Naturally, goods of all kinds are recoverable by the right of postliminium, and, could they be certainly known again, there is no intrinsic reason why moveables should be excepted. Ac-

cordingly the ancients, on recovering these things from the enemy, have restored them to their former owners*. But the difficulty of knowing again things of this nature, and the endless disputes which would spring from the revendication of them, have in most parts introduced a contrary practice. Farther, from the little hopes of recovering effects taken from the enemy, and once carried into a place of safety, the former owners are supposed to have relinquished and given them up. It is therefore, that with reason, moveables or booty are excepted from the right of postliminium, unless taken from the enemy immediately after the seizure of them; in this case it is neither difficult for them to be known again, nor can the proprietor be supposed to have relinquished them. A custom being once admitted, and well established, it would be unjust to trespass on it. Among the Romans indeed, slaves were not treated like other moveables; they, by the right of postliminium, were restored to their masters, even when the rest of the booty was detained: the reason of this is manifest, it being always easy to know a slave again, and to whom he belonged: the owner also, as he entertains hopes of recovering him, is not supposed to have relinquished his right.

Prisoners of war, who have given their parole, territories and towns which have submitted to the enemy, who have sworn or promised allegiance to him, cannot of themselves return to their former condition, by the right of postliminium; for faith is to be kept even with enemies (§ 174.)

But if the sovereign retakes these towns, countries, or prisoners, who had surrendered to the enemy, he recovers all his former rights over them, and is to re-establish them in their former condition (§ 205.); they then enjoy the right of postliminium without any breach of their word, or violation of faith. The enemy loses by arms the right he had gained by them. But concerning prisoners of war, a distinction is to be made. If they were entirely free on their parole, it is not only coming again under the power of their nation, which can deliver them; because had they even returned to their home, they would still have been prisoners. The will of him who took them, or his total submission, can alone discharge them; but if they have only promised not to run away, a promise they frequently make to avoid the evils of a prison, all they are bound to, is, that of themselves they shall not quit the enemy's country, or the place assigned for their dwelling; and if the troops of their party should get possession of the place where they dwell, they are by the laws of arms released and restored to their nation, and to their former state.

When a town, surrendering to the enemy's arms, is retaken by those of its sovereign, it thereby, as we have just seen, becomes restored to its former condition, and therefore to all its rights. It is asked whether it thus recovers such of its possessions, which had been alienated by the enemy, when he becomes master of it?

§ 210.
Of those who cannot return by the right of postliminium.

§ 211.
They enjoy this right when retaken.

§ 212.
Whether this right extends to their goods which had been alienated by the enemy?

* See several instances in Grotius, Book III. Chap. XVI. Sect. 2.

First,

First we are to distinguish between moveable goods, not recoverable by the right of postliminium (§ 202.) and immoveables. The former belong to the enemy who gets them into his hands, and he may alienate them irretrievably. As for immoveables, let it be remembered, that the acquisition of a town taken in war is not full complete till confirmed by a treaty of peace, or the entire submission or destruction of the state to which it belonged (§ 197.) Till then the sovereign of that town has hopes of retaking it, or recovering it by a peace. And from the moment it returns into his power, he restores it to all its rights (§ 205.), and consequently it recovers all its possessions, as far as in their nature they are recoverable. Therefore it re-assumes its immoveables from the hands of those who were precipitate in purchasing them. The buying them of him who had not the absolute disposal of them, was a hazardous bargain; and if they prove losers, it was what they deliberately exposed themselves to. But if this town had been ceded to the enemy by a treaty of peace, or was absolutely fallen into his power by the submission of the whose state, it has no claim to the right of postliminium. And the alienation of any of its possessions by the conqueror is valid and irretrievable. Should some subsequent fortunate revolution deliver it from the conqueror's yoke, it can revindicate them. When Alexander made a present to the Thessalians of the sum due from them to the Thebans (§ 77.), he was so absolutely master of the republic of Thebes, that he destroyed the city, and sold the inhabitants.

The same decisions take place with regard to the immoveables of individuals, prisoners, or not, which have been alienated by the enemy while he was master of the country. Grotius proposes the question, with respect to immoveables, belonging to a prisoner of war, in a neutral country *. But this question is void by our principles; for a sovereign taking a prisoner of war, has no other right than to detain him till (§ 148, &c.) the end of the war, or till he be ransomed; and has none on any of his rights, unless he can seize them. It is impossible to produce any natural reason why he who has taken a prisoner can have a right to dispose of any goods or possessions but those the prisoner has about him.

§ 213.
Whether a
nation that
has been
entirely re-
duced can
enjoy the
right of
postlimi-
nium.

When a nation, people, or state, has been entirely subdued, it is asked whether a revolution can entitle it to the right of postliminium. In order justly to answer this question, there must again be a distinction of cases. If this subdued state has not yet acquiesced in its new subjection, has not voluntarily submitted, and has only ceased to resist from inability; if its victor has not laid aside the sword of conquest, nor taken up the scepter of peace and equity, such a people are not really subdued: they are only conquered and oppressed, and on being delivered by an ally, they doubtless return to their former state (§ 207.) Their ally cannot become their conqueror; he is their deliverer, and all the obli-

* Lib. III. Cap. IX. Sect. 6.

gation of the party delivered is to reward him. If the latter conqueror, as not being an ally to the state of which we speak, will keep it under his laws, as the purchase of victory, he puts himself in the case of the former, and becomes the enemy of the state which the other had subdued. This state may lawfully resist him, and avail itself of a favourable opportunity to recover its liberty: if it had been unjustly subdued, he who rescues it from the yoke of the oppressor should generously restore it to all its rights (§ 203.).

The question changes with regard to a state which has voluntarily surrendered to a conqueror. If the people, no longer treated as enemies, but as good subjects, have submitted to a lawful government, they henceforth derive under a sovereign, or they are incorporated with the conquering state; they make part of it, and share its fate. Their former condition is absolutely effaced; all its relations, all its alliances, are extinguished (Book II. § 203.) Whoever then the new conqueror be, that afterwards subdues the state to which these people are united, they undergo the destiny of the former, as the part follows the whole. This has been the practice of nations in all ages; I say, even of just and equitable nations, especially with regard to an ancient conquest. The more moderate bestow liberty on a people which had but recently submitted, whom they do not consider as perfectly incorporated, nor well cemented by inclination with the state which conquered them.

If this people shake off the yoke, and recover their liberty by their own virtue, they regain all their rights, they return to their former state, and foreign nations have no right to determine whether they have withdrawn from a legal authority, or whether they have broke their chains.

Thus the kingdom of Portugal, which had been invaded and subdued by Philip II. king of Spain, under pretence of an hereditary right, but in effect from avidity backed by a superior force, after groaning under all the miseries of tyranny, recovered the independency of its crown, and regained its ancient rights by driving out the Spaniards, and placing the duke of Braganza on the throne.

Provinces, towns, and countries, which the enemy restores by the treaty of peace, are certainly entitled to the right of postliminium. For the sovereign, in whatever manner he recovers them, is, on their returning under his power, to restore them to their former state. The enemy in giving back a town at the peace, renounces the right acquired by his arms. It is as if he had never taken it. In this there is no reason, which exempts the sovereign from replacing it in all the rights of its former condition.

Whatever is ceded to the enemy by a treaty of peace, is truly and fully alienated. It has no longer an affinity with the right of postliminium, unless the treaty of peace be broken and annulled,

§ 214.
Of the right
of postlimi-
nium of
what is re-
stored
at the
peace.

§ 215.
And with
respect to
things
ceded to
the enemy.

§ 216.
The right
of postlimi-
nium
does not
take place
after a
peace.

§ 217.
Why al-
ways in
force for
prisoners.

And as things not mentioned in the treaty of peace, remain in the condition wherein they happen to be at the time of its conclusion, and are tacitly ceded on both sides to the possessor, it may be said in general, that the right of postliminium is secluded after the signature of the peace. This right entirely relates to the state of war.

Yet, and for this very reason, there is always an exception to be made here, in favour of prisoners of war. Their sovereign, on a peace, is to re-deliver them (§ 154.) If he cannot, if the state of arms necessitates him to accept of hard and unjust conditions, the enemy who should have released the prisoners when the war is at an end, having no longer any thing to fear from them (§ 150, 153.), continues the state of war by detaining them in captivity, but especially if he reduces them to slavery (§ 152.) Therefore they have a right, when an opportunity offers, to assert their liberty, to escape from his injustice, and return into their country, equally as in war time, since, with regard to them, the war continues. And then the sovereign, from his obligation to protect them, is to restore them to their former condition (§ 205.)

§ 218.
They are
free even by
escaping in-
to a neutral
country.

Farther, such prisoners who have been detained since the peace, without any just reason, are free; if after their escape from prison they can but reach a neutral country. For enemies are not to be pursued and seized in a neutral country (§ 132.) And whoever detains an innocent prisoner after the peace, continues his enemy. This rule should, and does actually, obtain among nations who reject enslaving prisoners of war.

§ 219.
How the
rights and
obligations
of prisoners
subsist.

It is sufficiently clear from the premises, that prisoners are to be considered as citizens who one day may return into their country, and on their return the sovereign is obliged to restore them to their former state; whence it evidently follows that the right of those prisoners, and the obligations to which they are bound, with the rights of others over them, still subsist entire, and only suffer a suspension in the exercise of part of them, during the imprisonment.

§ 220.
Of the will
of a pri-
soner of
war.

The prisoner of war, therefore, retains a right to dispose of his possessions, particularly in case of death; and as there is nothing in the state of captivity which can in this respect vacate the exercise of his right, the will of a prisoner of war is of force in his own country, unless annulled by some inherent defect.

§ 221.
Of mar-
riage.

Among nations, where marriage is indissoluble, unless dissolved by the interpreters of the law, the captivity of one of the parties does not affect the tie, and on his return home, he, by postliminium, is again intitled to all his matrimonial rights.

§ 222.
Of what is
established
by the
right of
postlimi-
nium in
treaties or
customs.

We do not here enter into a detail of what by the civil laws of nations is settled regarding the right of postliminium, observing only that these particular regulations bind only the subjects of the state alone, without being of any force against foreigners. Neither do we here examine what is adjusted by treaties; these particular conventions establish a factitious right, which relates

only to the contracting parties. Customs confirmed by long and constant use are obligatory on those people who have given a tacit consent to them, and are to be regarded, when not contrary to the law of nature; but those which offend against that sacred law are defective and void; every nation being so far from conforming to such customs, that it is obliged to endeavour the abolition of them. Among the Romans the right of postliminium was of force, even in profound peace, relatively to nations with which Rome had neither connections of friendship, right of hospitality, nor alliance*. This was because those people were considered in some measure as enemies. Milder manners have almost every where suppressed this remainder of barbarism.

C H A P. XV.

Of the Right of private Persons in War.

THE right of making war, as we have shewn in the first chapter of this book, belongs alone to the sovereign power; which not only decides whether it be proper to undertake the war, and declare it, but likewise directs all the operations as circumstances of the utmost importance to the welfare of the state. Therefore subjects cannot act herein of themselves, and without the sovereign's order they are not to commit any hostility. Self-defence however is by no means contained within this term of hostility. A subject may repel the violence of a fellow citizen, when the magistrate's assistance is not at hand; and with much greater right may he defend himself against the unexpected attacks of foreigners.

The sovereign's order commanding acts of hostility, and giving a right to commit them, is either general or particular. The declaration commanding all subjects to *attack the subjects of the enemy*, carries with it a general order. The generals, the officers, the soldiers, the partizans, and those who fit out private ships of war, having all commissions for the sovereign, make war by virtue of a particular order.

But if subjects stand in need of the sovereign's order to make war, it is only in virtue of the laws essential to every political society, and not as the result of any obligation relative to the enemy. For a nation taking up arms against another, from that instant declares itself an enemy to all the individuals of the latter, and authorises them to treat it as such. What right could it have to complain of hostilities committed by private persons without their superior's order? The right therefore we speak of relates to the general public law, rather than to the law of na-

§ 223.
Subjects
cannot
commit
hostilities
without the
sovereign's
order.

§ 224.
This order
may be ge-
neral or
particular.

§ 225.
Source of
the neces-
sity of this
order.

* Digest. Lib. XLIX. de Cap. & Postlim. Leg. V. Sect. 2.

tions,

tions, properly so called, or to the principles of the reciprocal obligations of nations.

§ 226.
Why the
right of na-
tions
should have
adopted
this rule.

If the law of nations be considered only in itself with regard to a rupture between two nations, all the subjects of the one may commit hostilities against those of the other, and do them all the damages authorised by a state of war. But should two nations thus encounter each other with the whole collected weight of their force, war would become much more bloody and destructive; it could scarce terminate but by the total destruction of one of the parties, which the example of the ancient wars abundantly prove. If we here call to mind the first wars of Rome with the neighbouring popular republic, we shall have reason to congratulate Europe on the contrary practice now become customary among nations, especially those which keep regular forces, or a body of militia. The troops alone carry on the war, while the remainder peaceably follow their callings. And the necessity of a particular order is so thoroughly established, that even after a declaration of war between two nations, if the peasants of themselves commit any hostilities, the enemy, instead of sparing them, hangs them up as so many robbers or banditti. This is the case with private ships of war: it is only in virtue of a commission granted by the sovereign or his admiralty, that they are entitled to be treated like prisoners taken in a formal war.

§ 227.
Precise
meaning of
the order.

In the declarations of war, however, the ancient form is still retained, by which all the subjects are ordered not only to break off all intercourse with the enemy, but to *attack them*. Custom interprets this general order. It actually authorises, nay even obliges all subjects, of whatever rank, to secure the persons and things belonging to the enemy, when they fall into their hands; but does not invite them to undertake any offensive expedition, without a commission or particular order.

§ 228.
What pri-
vate per-
sons may
undertake,
presuming
on the so-
vereign's
will.

There are notwithstanding occasions when the subjects may reasonably suppose the sovereign's will, and act in consequence of his tacit commands. Thus, though the operations of war are by custom generally resigned to the troops, if the townsmen of a strong place, taken by the enemy, have not promised or sworn submission to him, and a favourable opportunity offers itself of surprizing the garrison, and recovering the place for their sovereign, they may confidently presume that the prince will approve of this spirited enterprise. And who will censure it? Indeed, should the townsmen miscarry, they must expect very severe treatment from the enemy: but this does not prove the enterprise to be unjust, or contrary to the law of war. The enemy makes use of his right, of the right of arms, by which he is authorised in a certain degree to make use of terror, that the subjects of the sovereign with whom he is at war, may not be willing to venture on such bold undertakings, the success of which might prove fatal to them. No longer ago than the last war, the inhabitants of Genoa of themselves suddenly ran to arms, and drove the Austrians

out

out of the city: and the republic celebrates an annual commemoration of that event by which it recovered its liberty.

Persons fitting out ships to cruise on the enemy, in recompense of their disbursements, and the risque they run, acquire the property of the capture, but they require it by grants from the sovereign, who issues out commissions to them. The sovereign either gives up to them the whole capture or a part. This depends on the contract made between them. Subjects are not obliged scrupulously to weigh the justice of the war, which indeed they are not always able to obtain a just knowledge of; and in case of doubt, they are to rely on the sovereign's judgment (§ 187); there is no doubt but they may with a safe conscience serve their country by fitting out privateers, unless the war be evidently unjust. But on the contrary, foreigners taking commissions from a prince, to prey on a nation, absolutely innocent with respect to them, are guilty of an infamous practice. The thirst of gold is their only inducement, and however their commission may assure them of impunity, it cannot wash away their execrable guilt; they alone are excuseable who thus assist a nation of which the cause is indubitably just, and who have taken arms only to defend themselves from oppression. They would even deserve praise, if the hatred of oppression and the love of justice, rather than the desire of riches, actuated them to generous efforts, and to expose their lives or fortunes to the hazards of war.

The noble view of acquiring instruction in the art of war, and becoming more capable of serving our country, has introduced a method of serving as volunteers even in foreign armies, and the custom is doubtless justified by the sublimity of the motive. Volunteers taken by the enemy are treated as if part of the army in which they fight. Nothing can be more reasonable: they in fact unite themselves to this army, they support the same cause, no matter whether it be from obligation or of free will.

Soldiers can undertake nothing without the order, either expressed or tacit, of their officers. Obedience and execution are their province. They are not to act from their own opinion; they are only instruments in the hands of their commanders. Let it be remembered here, that by a tacit order, I mean the substance of what is included in an express order, or in the functions committed to us by a superior; and what is said of soldiers must also be understood of officers, and of all who have any subaltern command. Thus with respect to things, the care of which is not committed to them, they may both be compared to mere private persons, who are to undertake nothing without order. The obligation of the military is still more strict, as the laws of war expressly forbid acting without order; and this discipline is so necessary, that it scarce leaves any thing to presumption. In war, an enterprise of a very advantageous appearance, where the success is almost certain, may yet be attended by the most fatal consequences. It would be dangerous to leave it to the judgment,

ments of subalterns, who cannot know all the general's views, and who want his experience and penetration: it is not to be supposed that he intends to let them act of themselves. To fight without command is almost always considered in a soldier as fighting against command, or against the prohibition. Nor is there hardly any case (that of self-defence excepted) wherein soldiers and subalterns may act without order. Here the order may be safely presumed, or rather the right of self-defence naturally belongs to every one, and stands in no need of permission. During the siege of Prague, in the last war, a body of French grenadiers made a sally without orders or officers, possessed themselves of a battery, nailed up part of the cannon, and brought away the remainder into the city. This the Roman severity would have punished with death, according to the famous instance of the consul Manlius*, who pronounced sentence on his son, though victorious, for fighting without order. But the difference of times and manners obliges a general to moderate such severity. Marshal Belisle reprimanded publicly those brave grenadiers, but secretly distributed among them some money, in reward for their courage and good inclination. At another famous siege in the same war, that of Coni, the soldiers of some battalions, who were lodged in the moats, made a vigorous sally while their officers were absent, which was attended with great success. Baron Leutrum was obliged to pardon this fault, that he may not damp an ardor in which the safety of the place consisted; however, as far as possible, this inordinate impetuosity should be checked, as it may be of fatal consequence. Avidius Cassius punished, capitally, some officers of his army, who having no order, with a handful of men surprised and cut to pieces a body of three thousand. This rigour he justified by saying, that *there might have been an ambuscade: Dicens evenire potuisse ut essent insidiae, &c.* †.

§ 232.
Whether a
state is to
indemnify
subjects for
damages
sustained in
war.

Is the state to make good to private persons the damages sustained in war? We may see in Grotius that authors are divided on this question. Here two kinds of damages are to be distinguished; those done by the state or sovereign, and those done by the enemy. Of the first kind, some are done voluntarily and by precaution, as when a field, a house, or garden, belonging to a private person, is made use of for building the rampart of a town, or some other piece of fortification; when his standing corn, or his store-houses are destroyed to prevent their being of use to the enemy. Such damages are to be made good to the owner, who should bear only his quota: but other damages are caused by inevitable necessity; as for instance, the havoc done by the artillery in retaking a town from the enemy. These are accidents; they are calamities arising from fortune. The sovereign, if the state of his affairs permit, is to shew an equitable

* Tit. Liv. Lib. VIII. Cap. VII.

† Volcatus Calican, cited by Grotius, Book III. Chap. XVIII. Sect. 1. Note 6. regard

regard for the sufferer; but no action lies against the state for misfortunes of this nature, for losses which it has not occasioned willingly, but through necessity and fortuitously, and in the exercise of its rights. The same may be said of damages caused by the enemy. All the subjects are exposed to such damages, and unhappy is his lot on whom they fall. In a society this may be hazarded with respect to substance and effects, as life is also risked. Was the state strictly to indemnify all such who suffer in these cases, the public finances would be soon exhausted. Every one must contribute his share in due proportion, which would be impracticable. Besides, these indemnifications would be liable to a thousand abuses, and there would be no end of the particulars; it is therefore to be supposed that no such thing was ever meant by those who formed a society.

But it is highly consentaneous to the duties of the state and the sovereign, and consequently equitable, nay, very just, to relieve, as far as possible, those unhappy sufferers who have been ruined by the desolation of war, as likewise to take care of a family whose head and support has lost his life for the service of the state. There are many debts sacred to him who knows his duty, though no action can be brought against him.

C H A P. XVI.

Of several Conventions made during the Course of the War.

WAR would become too cruel and destructive, were all intercourse between enemies absolutely destroyed. There still subsist, according to Grotius's observation *, commerces of war, as Virgil † and Tacitus § term them. The occurrences and events of war lay enemies under the necessity of entering into several conventions. What we have already said in general of the faith to be kept between enemies, excuses us from proving here the obligation of faithfully acting up to conventions made in war; it only therefore remains to explain the nature of them. Sometimes it is agreed to suspend hostilities for a certain time; and if this convention be only for a very short time, or for any place particularly, it is called a cessation or suspension of arms. Such are those made for burying the dead, after an assault, or after a battle, and for a parley, or a conference between the generals of both sides. If the agreement be for any length of time, and especially if general, it is more particularly distinguished by the appellation of a truce. Many use these words indiscriminately.

* Lib. III. Cap. XXI. Sect. 7.

† ——— bellii commercia Turnus sustulit ista prior. *Æneid.* X. v. 530.

§ Ann. Lib. XIV. Cap. 33.

§ 223.
Of a truce
and suspen-
sion of
arms.

§ 234.
Does not
terminate
the war.

§ 235.
A truce is
either par-
ticular or
universal

The truce or suspension of arms does not terminate the war; it only suspends the operations.

A truce is either particular or universal. By the former, hostilities cease only in certain places, as between a town and the army besieging it. By the latter, they are to cease generally, and in all places between the belligerent powers. Particular truces may also admit of a distinction with regard to the acts of hostility, or to the persons; that is, it may be agreed to abstain for a time from certain hostilities, or two armies may mutually conclude a truce, or suspension of arms, without respect to place.

§ 236.
A general
truce for
many years.

A general truce made for many years, differs from a peace in little else than in leaving the original question of the war undecided, as they found it. To nations tired of war, and not agreeing on the subject of their difference, have recourse to this kind of compact. Thus between Christians and Turks, instead of a peace, only long truces have been usually made; sometimes from a false spirit of religion, and sometimes neither being willing reciprocally to acknowledge each other as lawful masters of their respective possessions.

§ 237.
By whom
these agree-
ments may
be con-
cluded.

It is necessary to the validity of an agreement, that it be made with a sufficient power; every thing done in war is by the authority of the sovereign, who alone has the right both of undertaking the war, and directing the operations (§ 4.) But from the impossibility of executing every thing by himself, there is a necessity of communicating part of his power to ministers and officers. It is asked, what are the things of which the sovereign reserves the disposal to himself, and which he is naturally thought to intrust to the ministers of his will, to the generals, and other military officers? We have above (Book II. § 207.) laid down, and explained the principle, which is to be here a general rule. Without a special mandate from the sovereign, the person commanding in his name is held invested with all the necessary powers for the reasonable and salutary exercise of his functions, for every thing which naturally follows from his commission. The remainder is reserved to the sovereign, who is not supposed to communicate more of his power than is necessary for the good of his affairs. According to this rule, a general truce can only be concluded by the sovereign himself, or by him to whom he has delegated such a power. For that a general should be invested with an authority of such extent, is not necessary to the success of his operations; it would exceed the limits of his functions, which are to direct the operations of war, wherein he has the command, and not to regulate the concerns of the state. To conclude a general truce, is of such importance, that the sovereign is always thought to have reserved it to himself. So large a power is granted only to a viceroy or governor of a distant country, for the territories under him. If the truce be for years, it is natural to suppose the sovereign's ratification necessary. The consuls and other Roman

commanders might grant general truces for the time of their commission; but if this term was considerable, or the truce made for a longer time, it required the ratification of the senate and people. Even a particular truce, when for a long time, seems also to exceed the ordinary power of a general; and he cannot conclude it but under a reserve of the ratification.

But as for particular truces, made for a short time, it is often necessary, and almost always proper, that the general should have a power of concluding them. *Necessary*, when there is no waiting the prince's consent: *proper*, on occasions, when the truce can tend only to save the shedding of human blood, and is for the common advantage of the contracting parties. Therefore, with such a power the general or commander in chief is naturally supposed to be invested. Thus the governor of a place, and the general besieging it, may agree on a cessation of arms, for burying the dead, or for coming to a parley; they may even settle a truce for some months, on condition that the place, if not relieved within that time, shall surrender. Conventions of this kind soften the evils of war, and probably can be of no detriment to any one.

All these truces and suspensions of arms are concluded by the authority of the sovereign, who to some consents in his own immediate person, and to others through the ministry of his generals and officers. They bind his faith, and he is to see them observed. § 238. The sovereign's faith engaged in them.

The truce binds the contracting parties, from the moment of its being concluded, but cannot have the force of a law with regard to subjects on both sides, till it has been solemnly proclaimed: and as an unknown law carries no obligation with it, the truce does not bind the subjects, but as it becomes duly notified to them. § 239. When the truce begins its obligation. So that if, before any certain knowledge could reach them, they commit any thing contrary to it, any hostility, it is not punishable. But the sovereign, from a regard to his promises, is obliged to cause the prizes taken since the moment when the truce should have begun, to be restored. Subjects who for want of a previous knowledge have not observed it, are bound to no compensation, any more than the sovereign who could not signify it to them sooner; it is an accident without any fault of his, or theirs. A ship being on the open seas at the time of publishing the truce, meets with a ship of the enemy, and sinks her: as there is no guilt in this case, she is not liable to pay any damage. If she has made a capture of the vessel, all the obligation she lies under is to restore it, as not retenable by the truce.

But any, by their own fault, not ignorant of the truce, would be bound to make good the damage committed against the party. A simple and especially a slight fault may in some measure escape punishment, and doubtless it does not deserve to suffer equally with fraud; but against the reparation of the damage it is no dispensation. For avoiding as much as possible all difficulty,

sovereigns in truces, as in treaties of peace, usually fix terms for the cessation of hostilities, according to the situation and distance of places.

§ 240.
Publication
of the truce.

Since a truce cannot bind subjects, unless known to them; it is to be solemnly published in all places where it is intended it should be observed.

§ 241.
Of subjects
contraven-
ing the
truce.

Should subjects, whether private or military, offend against the truce, this is no violation of public faith, nor is the truce thereby broken; but the delinquents should be compelled to an ample compensation of the damage, or severely punished. Should a sovereign refuse justice on the complaints of the party injured, he thereby becomes accessory to the trespass, and violates the treaty.

§ 242.
Violation of
the truce.

If one of the contracting parties, or any person by his order, or with his consent only, commit any act contrary to the truce, it is an injury to the other contracting party; the truce is dissolved, and the party offended is entitled to take up arms, not only for renewing the operations of the war, but also for revenging the recent injury offered it.

§ 243.
Of the case
when a pe-
nalty has
been settled
on the in-
fractor.

Sometimes a penalty on the infractor of the truce is reciprocally stipulated, and then the truce is not immediately broken on the first infraction: if the party offending submits to the penalty, and repairs the damage, the truce subsists, and the party offended has nothing farther to claim. If an alternative has been settled, that in case of an infraction the delinquent shall suffer a certain penalty, or the truce be broken, the party injured may chuse whether he will demand the penalty, or make use of his right to take up arms again. For were it at the option of the infractor, the stipulation of the alternative would have been fruitless; since by refusing to comply with the penalty simply stipulated, he breaks the compact, and thereby gives the injured party a right to take up arms again: besides, in clauses of security like this, the alternative is not supposed to be in favour of him who fails in his engagements, and it would be absurd to suppose that he reserves to himself the advantage of breaking it by his infraction rather than undergoing the penalty. He might as well break it at once openly. The penal clause is appointed only to secure the truce from being so easily broken, and can be placed with the alternative, only that a right may be left to the injured party of breaking a compact, if he thinks fit, in which from the behaviour of the enemy he sees little security.

§ 244.
Of the time
of the truce.

It is necessary that the time of the truce be well specified, to prevent any doubt or dispute from the moment of its beginning to its period. By the words *inclusively* and *exclusively* all ambiguity which may happen to be in the convention, with regard to the two terms of the truce, its beginning and end, will be avoided: for instance, if it be said that the truce shall last from the first of March *inclusively*, until the fifteenth of April *also inclusively*, there can remain no doubt; whereas had it been only said from the first of March until the fifteenth of April, it might

might be disputed whether those two days mentioned as the initial and final terms of the truce, were comprehended in the treaty or not, and indeed authors are divided as to this point. As to the first of those two days, it seems beyond all question to be comprised within the truce; for if it be agreed that there shall be a truce from the first of March, this naturally means that hostilities shall cease from the first of March; as to the latter day, there is something more of doubt, the expression *until* seeming to separate it from the time of the armistice. And a truce as saving blood is without doubt a point to be regarded, and perhaps the safest way is to include in it the very day of the term: the circumstances may also be of use for determining the meaning, but it is very wrong not to remove all ambiguity when it may be avoided only with a word or two more.

The word *day* in national conventions, is to be understood of a natural day, since it is in this meaning that a day is the common measure among nations. The computation by civil days owes its origin to the civil law of every people, and varies according to countries. The natural day begins at sun-rising, and lasts twenty-four hours, being the diurnal revolution of the sun: therefore if a truce of an hundred days be agreed on to begin on the first of March, the truce begins at sun-rising on the same day, and is to continue an hundred days of twenty-four hours each; but as the sun throughout the whole year does not rise at the same hour, for avoiding all chicanery unworthy of that candour which should prevail in these kind of conventions, the truce must certainly be understood to end as it began, at the rising of the sun. The term of a day is meant from one sun to the other, without any prevaricating or standing out for a few moments in its rising. He who having made a truce for an hundred days beginning on the twenty-first of June, when the sun rises about four o'clock, should on the day the truce is to end, take arms at that very hour before the sun rise, would certainly be considered as guilty of a mean and unjustifiable chicanery.

If no term has been specified for the commencement of the truce, as it binds the contracting parties immediately on its conclusion (§ 239.) it concerns them to cause it to be published immediately, in order to the observance of it, for it becomes binding on the subjects only from the time of its proper publication (§ *ibid.*), and it begins to take effect only from the moment of the first publication, unless the agreement be otherwise.

The general effect of a truce is that all hostilities shall absolutely cease, and for avoiding any dispute on what may be termed such, the general rule is: That each, during the truce, may within his own territories, and in the places where he is master, do whatever he had a right to do in time of full peace. Thus a truce does not hinder a prince from levying soldiers, assembling an army in his dominions, marching troops thither, and even calling in auxiliaries, and repairing the fortifications of a place,

§ 245.
Of the effects of a truce; what is allowed or not during the continuation.
1. Rule, each may

do among themselves what it is a right of doing in full peace.

§ 246.

Rule 2.

Advantage is not to be taken of doing what could not be done during the hostilities.

§ 257.

For instance, to continue the works of a siege, or repair breaches.

which at that time is not besieged; as he has a right to do all these things in time of peace, the truce does not tie up his hands. Can it be supposed that in such a compact he means to debar himself from executing things which the continuation of hostilities could not prevent him from doing?

But to make use of the cessation of arms for safely executing things detrimental to the enemy, and not to be safely undertaken amidst hostilities, is circumventing and deceiving the enemy with whom the compact has been made: it is a breach of the truce. By this second general rule we may solve several particular cases.

The truce concluded between the governor of a place and the general besieging it, deprives both of the liberty of continuing their works; with regard to the latter this is manifest, his works being those of hostility; but the governor also cannot avail himself of this armistice for repairing the breaches, raising new fortifications; the artillery of the besiegers does not allow him to carry on such works with impunity during the course of hostilities, therefore it would be detrimental to them that he should employ the truce in this manner, and they are under no obligation to be so far imposed on. They will, and very justly do, consider such proceedings as a breach of the truce. But the cessation of arms does not hinder the governor from continuing within his town such works, to which the fire or attacks of the enemy were no obstacle. At the last siege of Tournay, after the surrender of the place, an armistice was agreed on; and the governor in the mean time permitted the French to make their dispositions against the citadel, carry on their works, and raise batteries, because on his side the governor was clearing away the rubbish with which the blowing up of a magazine had filled the citadel, and was erecting batteries on the ramparts. But all this he might have carried on with little or no danger, had the operations of the siege began, whereas for the French to have carried on their works with such expedition to have made their approaches, and erect batteries, must have cost a great many men. So that there was no parity, and on this footing the truce was entirely in favour of the besiegers: accordingly they were masters of the citadel a fortnight before they probably would have been.

§ 248.

Or to introduce succours.

If the truce be concluded either for settling the conditions of the capitulation, or to wait for the orders of the respective sovereigns, the besieged governor cannot make use of it for getting any succours or stores into the place. This would be an abuse of the armistice, and deceiving the enemy, which is contrary to candor. The meaning of such a compact manifestly is, that all things shall remain as they were at the moment of its conclusion.

§ 249.

Distinction of a particular case.

But this is not to be extended to a cessation of arms agreed on for some particular circumstance, as burying the dead. This is interpreted according to its object. There firing ceases either every-where, or only at one attack, as stipulated, that each party may

may freely carry off their dead, and during this intermission of the fire no works are to be carried on, which were opposed; this would be making an ill use of the armistice, consequently would be a breach of it. But it is very allowable for a governor, during such a suspension of arms, silently to procure any reinforcement through a passage remote from the attack. If the besieger be lulled by such an armistice to abate his vigilance, he must stand to the consequence. The armistice of itself does not facilitate the entrance of such succours.

Likewise if an army, in a bad position, after a battle, proposes and concludes an armistice, for burying the dead, it cannot pretend to extricate itself in sight of the enemy, during the suspension, and march off without molestation. This would be availing itself of the compact for executing what otherwise it could not have done. This would be laying a snare, and conventions cannot be snares; so that on a motion to quit the disadvantageous station, the enemy may justly obstruct it; but should this army silently file off in the rear, and thus reach a safer post, it would be no breach of faith. All implied by a suspension of arms for burial of the dead, is that neither side shall attack whilst this office of humanity is performing. The enemy can only blame its own remissness; he should have stipulated that, during the cessation of arms, each was to remain in his post; or should have kept a good watch, and on perceiving the army's design, he might lawfully have opposed it. To propose a cessation of arms for a particular object, with a view of lulling the enemy asleep, and covering a design of retreating, is a stratagem entirely innocent.

But if this truce be not made for some particular object only, we cannot honourably avail ourselves of it for taking any advantage, as securing some important post, advancing into the enemy's country. The latter step would indeed be a violation of the truce, for to advance into the enemy's country is an act of hostility.

Now, as a truce suspends hostilities without putting an end to the war, all things (while the truce continues) in the places contested, of which the possession is disputed, are to be left as they were, and nothing must be undertaken therein to the detriment of the enemy. This is a third general rule.

When the enemy withdraws his troops from a place, and absolutely quits it, he does not intend to keep possession of it any longer, and in this case it is entirely consistent with the truce to occupy it. But if by any sign it appears that a port, an open town, or village, is not relinquished by the enemy, and that though he neglects it, he maintains still his rights and claims to it, the truce forbids any invasion of it. To take away from the enemy what he is disposed to retain, is an act of hostility.

It is also a manifest hostility to receive towns or provinces inclined to withdraw from the sovereignty of the enemy, and give themselves up to us.

§ 250.
Of an army withdrawing during a suspension of arms.

§ 251.
Rule 2. Nothing to undertake in contested places, but every thing to be left as it was.

§ 252.
Of places quitted or neglected by the enemy.

§ 253.
Subjects inclined to revolt against their prince not to be entertained.

§ 254.
Much less
to be solli-
cited to
treason.

And by far more unlawful, during the truce, to instigate the subjects of the enemy to revolt, or to practise upon the fidelity of his governors and garrisons. These are not only acts of hostility, but of odious hostilities (§ 180.). As for deserters and fugitives, they may be received during the truce, for they are received even in full peace, when there is no treaty to the contrary: and had there been such a treaty, the effect was annulled, or at last suspended by the war, which since happened.

§ 255.
Persons or
effects of
enemies not
to be seized
during the
truce.

To seize persons or things belonging to the enemy, without cause given for some particular fault, is an act of hostility, and consequently not allowable during a truce.

§ 256.
Of the
right of
postliminy
during the
truce.

Since the right of postliminy is founded only on the state of war (Chap. XIV. of this Book) it cannot take place during the truce, which suspends all the acts of war, and leaves every thing as they were; prisoners themselves cannot then withdraw from the power of the enemy in order to recover their former condition, as the enemy has a right of detaining them during the war, and it is only on its conclusion that his right over their liberty expires.

§ 257.
Intercourse
allowed
during a
truce.

Enemies may naturally come and go into each others country, during the truce, especially if made for a considerable time, equally as in time of peace, hostilities being all suspended. But every sovereign, as he would also in time of peace, is at liberty to use precaution, that these intercourses may not prove detrimental; there is just cause for suspecting people with whom he is soon to renew the war. At making the truce he may declare that he will admit none of the enemy within his territories.

§ 258.
Of persons
detained
after the
truce by an
invincible
obstacle.

They who having passed into the enemy's country during the truce, and are detained there by sickness or any other insurmountable obstacle, and thus happen to be there at the expiration of it, may in the strict sense of the law of arms be kept prisoners: it is an accident they might foresee, and to which they have of their own accord exposed themselves; but humanity and generosity allow them a sufficient respite for departing.

§ 259.
Of particu-
lar condi-
tions added
to truces.

If in the treaty of a truce any thing be excepted from, or added to, what has been now said, it is a particular convention, by which the contracting parties are bound. They are to observe what they have promised in a valid form; and the obligations resulting from it form a pacific right, the detail of which is foreign to the plan of this work.

§ 260.
At the
expiration
of the truce
the war is
renewed
without
any fresh
declaration.

As the truce only suspends the effects of war (§ 233.), at its expiration hostilities may recommence, without any fresh declaration of war; for every one previously knows that the war will resume its course from the moment of expiration, and the reasons for the necessity of a declaration have no place here (§ 51.) A truce made for many years, however, very much resembles peace, and differs from it only in that it leaves the subject of the war subsisting. Now, as a long space of time may bring about a great change in circumstances and dispositions on both sides,

sides, the love of peace so becoming in sovereigns, the care they should take of sparing their subjects' blood, and even that of their enemies: such beautiful dispositions, I say, should seem to require of princes not to take up arms again at the expiration of a truce, in which all military preparatives had been totally laid aside, without making some declaration inviting the enemy to prevent effusion of blood. The Romans have given us an example of this moderation so very commendable: they had only made a truce with the city of *Vei*, and the enemy even renewed hostilities without waiting the expiration of the truce, yet at that time the college of the *Feciales* gave it as their opinion, that satisfaction should be demanded, previous to their taking up arms again *.

The capitulation of places, on surrendering, are among the principal conventions made between enemies, during the course of the war, they are usually settled between the general of the army besieging, and the governor of the town besieged, both acting by the authority attributed to their respective post and commission. § 261.
Of capitulations, and by whom they may be concluded.

We have elsewhere shewn (Book II. Chap. XIV.) the principles of the power committed to subaltern officers, with the general rules for judging of them. All this has been now recapitulated in a few words, and applied particularly to generals and other commanders in chief (§ 237.). As a general and governor of a place must naturally be invested with all the powers necessary for the exercise of their respective functions, there is a right of presuming that they have these powers, and that of concluding a capitulation is certainly one of this number, especially when there is no waiting for the sovereign's orders. A treaty made by them on this head is therefore valid, and binds the sovereigns, in whose name and authority the respective commanders have acted.

But let it be observed, that these officers not exceeding their powers should keep punctually within the terms of their functions, and forbear meddling with things which have been committed to them; the attack and defence, the taking or surrender of a place, relate only to the possession, and not to property and right. The fate of the garrison is likewise concerned in it. Thus commanders may agree about the manner in which the capitulating town shall be possessed; the general besieging may promise that the inhabitants shall be safe, their religion, franchises, and liberty of the place preserved, and may allow the garrison to march out with ammunition and baggage, with all the honours of war, to be escorted and conducted to a place of safety. The governor of a place, if reduced to it by the state of affairs, may deliver it up at discretion, may surrender himself and his garrison prisoners of war, or engage that, for a stipulated time, or even to the end § 262.
Of clauses contained in them.

• Tit. Liv. Lib. IV. Chap. XXX.

of the war, they shall not carry arms against the enemy or his allies: and he validly promises for all under his command, who are obliged to obey him while he keeps within the limits of his function (§ 23).

But should the besieging general take on him to promise that his master shall never appropriate to himself the place when surrendered, or at a certain term shall be obliged to restore it, he would exceed the limits of his commission contracting for things, quite out of his power. And the like may be said of a governor who in the capitulation should go so far as to alienate his town for ever, and to deprive his sovereign of the right of retaking it; or who promises that his garrison should never carry arms, not even in another war. It is manifest that his functions give him no such power. Therefore, in conferences for a capitulation, should one of the commanders insist on conditions which the other does not think himself empowered to grant, one expedient is left them, which is to settle a suspension of arms; whereby all things remain as they were till further orders be received.

§ 263.
Observation on capitulations, and the usefulness of it.

At the beginning of this chapter we have shewn our reasons for not entering into explicit proofs here, that all these conventions made during the course of the war, are to be inviolably adhered to; we shall therefore only observe with regard to capitulations in particular, that as to violate them is unjust and scandalous, so this perfidiousness often proves detrimental to the party who has been guilty of it. Who will henceforth place any confidence in him? the towns which he shall attack will hold out the most terrible extremities, rather than rely on his word. He as it were strengthens his enemies by inciting them to a desperate defence, and every siege which he undertakes will be terrible. On the contrary, fidelity attracts confidence and affection; it facilitates enterprises, removes obstacles, and paves the way to glorious successes. Of this, history furnishes us a fine example in the conduct of George Basse, general of the imperialists in 1602, against Battori and the Turks. The insurgents of Battori's party having surprised Bistrith, otherwise called Missa, Basse recovered the town by a capitulation, which in his absence was violated by some German soldiers: but being informed of it, he immediately hung up all the soldiers to a man, and out of his own purse paid the inhabitants all the damages they had sustained. This action wrought so on the rebels, that they all submitted to the emperor, without demanding any other surety than the word of general Basse *.

§ 264.
O promises made to the enemy by individuals.

Individuals, military or others, who happen to be alone with the enemy, are through this necessity left to their own conduct; they may, as to their own persons, do what an officer might do for himself, and his corps: so that if by reason of their situation they make any promise, provided it does not turn on things which can never be in the disposal of private persons, this

* Memoires de SULLY, redigés par M. de L'Ecluse, Tom. IV. p. 179 & 180
promise

promise is valid, the power with which it is made being sufficient. For when a subject can neither receive his sovereign's orders nor enjoy his protection, he returns to his natural rights, and is by all just and fair means to consult his safety: so that if this individual has promised a sum for his ransom, the sovereign so far from having a right to discharge him from his promise, should oblige him to fulfil it: the good of the state requires the observance of faith, and that subjects should have this way of saving their lives or recovering their liberty. Thus a prisoner released on his word, is to observe it religiously, and his sovereign has no right to oppose the discharge of so essential a duty; for it was only on giving his word that the prisoner was released.

Country people also, the inhabitants of villages or defenceless towns, are bound to pay the contributions which they have promised, to save themselves from pillage.

What is much more, a subject would even be allowed to renounce his country, if the enemy, being master of his person, refused to grant him life on any other condition. For as the society cannot protect and defend him in this exigency, he enters on his natural rights. And besides, should he obstinately refuse compliance, what will the state get by his death? Undoubtedly while any hope remains, while there is any way of serving our country, we are to expose ourselves for it; nor should any dangers deter us. I here suppose that we are either to renounce our country or to die miserably, without being any advantage to it. If we by our death can serve it, then let us imitate the heroic generosity of the *Decii*. Indeed an engagement to serve against our country, were it even for saving our life, is dishonourable; rather than acquiesce to such a scandalous promise, a man of spirit would die a thousand deaths. If a soldier meeting an enemy in a by place, seizes him, but promises him his life or liberty on condition of a ransom, this agreement is to be regarded by the superiors, for the soldier being then left to himself, and his own master, did nothing beyond his right. He might have thought that it was not proper for him to attack that enemy, and let him go. Under his officer he is to obey, when alone he is left to his own prudence. Procopius relates that two soldiers, the one a Goth and the other a Roman, who being fallen together into a pit, reciprocally promised each other their life; and this agreement was approved by the Goths.

C H A P. XVII.

Of Safe Conducts and Passports, with Questions on the Ransom of Prisoners of War.

A SAFE-GUARD and passport are a kind of privilege, which gives persons a right to go and come safely, or the right of removing certain things in safety. The word passport is used, Of safe-guard and passport.

in some occurrences, for persons in whom there is no particular exception against their coming or going in safety, and whom it the better secures for avoiding all debate, or dispensing them from some general prohibition. A safe-conduct is given to those who otherwise could not safely go to the places where he who grants it is master; for instance, to a person charged with some misdemeanor, or to an enemy. We are here to treat of the latter.

§ 266.
From what
authority
it emanates.

All safe-conducts, like every other act of supreme cognizance, flow from the sovereign authority; but the prince may delegate to his officers the power of furnishing safe-conducts, and with this they are invested, either by an express commission, or in consequence of the nature of their functions. A general of an army from the very nature of his post, can grant safe-conducts; and as they are derived, though mediately from the sovereign authority, the other generals or officers of the same prince are to respect them.

§ 267.
not
transferable
from one to
another.

The person nominated in the safe-conduct cannot transfer his privilege to another; not knowing whether it be indifferent to him who gave it, that any other should use it in his stead, and he is not to presume such a thing, nay, so far from presuming it, he is rather to suppose the contrary, by reason of the abuses which may arise from it; and he cannot assume to himself any farther privilege than was intended him. If the safe-conduct be granted, not for persons, but for effects, those effects may be removed by others beside the owner. The choice of those who remove them is indifferent, provided there be no personal exception, which renders them justly suspected by him who gives the conduct, or interdicts them from entering his territories.

268.
Extent of
the security.

He who promises security by a safe-conduct, promises it where he is master, not only in his territories but likewise where any of his troops may be, and he not only is to forbear violating this security, either by himself or his people, but he is to protect and defend him to whom he has promised it, to punish any of his subjects who have offered any violence to him, and oblige them to make good the damage.

§ 269.
How the
right given
to a safe
conduct is
to be
judged.

The right arising from a safe-conduct, proceeding entirely from the will of him who grants it, this will is the standard by which the extent of it is to be measured: and this will shows itself in the end for which the safe conduct was granted: consequently he who has been permitted to go away, has no right to return, and a safe-conduct granted purely for going, cannot serve for repassing. If granted for certain affairs, it is to be of force till those are concluded, and the person has time to depart; if it is specified to be granted for a journey, it will also serve for the repassing, the journey including both the passage and return. As this privilege consists in the liberty of going and coming in safety, it differs from the permission in settling in any part, and consequently cannot give a right to stop any where, for a long time, unless on business, with a view to which the safe-conduct was asked and granted.

A safe-

A safe-conduct given to a traveller, naturally includes his baggage or his cloaths, and every thing necessary for his journey, with even a domestic or two, according to the rank of the person; but with regard to these particulars, as others we have touched on, the safest way, especially among enemies and other suspected persons, is to enumerate and categorically express every thing, which is now the present practice: the baggage and domestics, where requisite, are particularised.

§ 270.
Whether it includes the baggage and domestics.

Though a permission to settle any where, granted to the father of a family, naturally includes his wife and children, it is otherwise with a safe-guard; for if a man settles any where, his family is generally with him, but in journeys it is usually left at home.

§ 271.
Safe conduct granted to the father, does not contain his family.

The safe-conduct granted to a person for *himself and his retinue*, cannot give him a right of bringing with him persons justly suspected to the state, or who had been banished, proscribed, or were fugitives for some time; nor give security to such: for the sovereign granting safe-conduct in those general terms, does not suppose any such insolence as to abuse it, for bringing into his country delinquents, or persons who have particularly offended him.

§ 272.
Of a safe conduct given in general to any one and his retinue.

A safe-conduct given for a stated term, expires at the end of the term specified therein. And the bearer, if he does not retire before that time, may be seized, and even punished according to circumstances; especially if he has given room for suspicion by a delay of his own framing.

§ 273.
Of the time of the safe conduct.

But if detained by force, as by sickness, so as to be unable to depart in time, a proper respite should be allowed him; for safety has been promised to him, and though assured him only for a limited time, it is not his fault that he has not departed within the term. The case is different from that of an enemy coming into our country during a truce; he has no special promise from us; he at his own peril makes use of a general liberty allowed by the suspension of hostilities: all we have promised to the enemy is, to forbear hostilities for a certain time, and at the expiration of it we are concerned to see that their course be freely renewed, without the disturbance of endless excuses and pretences.

§ 274.
Of a person detained forcibly beyond the term.

The safe-conduct does not expire at the decease or deposition of him who granted it; for it was given in virtue of the sovereign authority which never dies, nor is the efficacy thereof annexed to the person exercising it. It is of this act as of other ordinances of the public power; their validity, their duration does not depend on the life or removal of him who enacted them, unless in their very nature, or by express declaration, they are personal to him.

§ 275.
The safe conduct does not expire at the death of him who gave it.

This does not hinder but that the successor may, on good reasons, revoke a safe-conduct; even he from whose hands it came may in like case revoke it, and is not always obliged to make known his reasons. Every privilege, when it becomes detrimental to the state, may be revoked; such as a gratuitous privilege, purely and simply, a purchased privilege, by indemnifying the parties concerned. Suppose a prince or his general are preparing

§ 276.
How it may be revoked.

a secret

a secret expedition, is he to suffer that by means of a safe-conduct before obtained, his preparatives shall be inspected, by which the enemy may gain intelligence of them? But a safe-conduct is not to be used as a snare; if it be revoked, the bearer must be allowed time and liberty to depart in safety. If he, like any other traveller, be detained some time, to prevent his carrying intelligence to the enemy, no ill treatment is to be offered him; nor is he to be kept longer than while the reasons of his detainer subsist.

§ 277.
Of a safe
conduct
with the
clause for
such time
as we shall
think fit.

If the safe-conduct has this clause, *For such time as we shall think fit*, it gives only a precarious right, and is revocable every moment; but while it is not *express*, it remains valid; it expires on the death of him who gave it, who from time ceases to will the continuation of the privilege; yet it must always be understood that from the moment of the expiration of such conduct, the bearer is to be allowed a proper time for his safe departure.

§ 278.
Of conven-
tions re-
lating to
the ransom
of prison-
ers.

After discussing the right of making prisoners at war, the obligation of releasing them at the peace by exchange or ransom, and of that incumbent on the sovereign to deliver them, it remains to consider the nature of conventions relating to such unfortunate persons. If sovereigns at war have agreed on a cartel for the exchange or ransom of prisoners, they are faithfully to observe it no less than every other convention; but if, as was formerly the frequent practice, the state leaves to every prisoner, at least during the war, the care of redeeming himself; such particular conventions offer many questions, of which we shall only touch on the principal.

§ 279.
The right
of require-
ing a ran-
som may be
transferred.

He who has acquired a lawful right of demanding a ransom from his prisoner may transfer his right to a third person. This was practised in the last ages: it was frequent for military persons to resign their prisoners to others, and consequently all the rights they held over them. But as the person taking a prisoner is obliged, for the sake of his reputation, to treat him with justice and humanity (§ 150), he is not to transfer his right in an unlimited manner, to one who might probably abuse it: when he has agreed with his prisoner concerning the price of the ransom, he may transfer the right to whom he pleases.

§ 280.
What may
annul the
convention
made for
the rate of
the ran-
som.

On the conclusion of an agreement made with a prisoner for the price of his ransom, it becomes a perfect contract, and cannot be receded from under pretence that the prisoner is discovered to be richer than was imagined: for there is no manner of necessity he should be rated according to the wealth of a prisoner; that is not the scale for measuring the right of detaining a prisoner of war (§ 148, 153). But it is natural to proportion the price of the ransom to the prisoner's rank and character; the liberty of an officer of distinction being of greater consequence than that of a private man, or inferior officer. If the prisoner has not only concealed but disguised his rank, it is a sordid fraud, and gives a right for annulling the agreement.

If a prisoner, having agreed on the price of his ransom, dies before payment, it is asked whether this price be due, and whether the heirs are obliged to discharge it? Unquestionably they are obliged to it, if the prisoner died in the possession of his liberty: for from the moment of his release, in consideration of which he had promised a sum, this sum becomes due, and does not at all belong to his heirs. But if he had not obtained his liberty at the time of his death, it can be no debt to him or his heirs, unless the agreement was otherwise; and he is not reputed to have received his liberty till he is absolutely permitted to depart free; and neither he whose prisoner he was, nor the sovereign, opposed his release and departure.

§ 281.
Of a prisoner dying before payment of ransom.

If he has only been permitted to take a journey for applying to his friends, or his sovereign, to furnish him with the means of ransoming himself, and he dies before he is possessed of his full liberty, before his final discharge from his parole, nothing is due for his ransom. If after agreeing on the price, he is detained in prison till the time of payment, and he dies before, the debt is paid by his death, and does not affect his heirs; such an agreement on the side of him who detains his prisoner, being no more than a promise of giving him his liberty for a certain sum paid down. A promise of buying and selling does not suppose the purchaser to pay the price of a thing, if it happens to perish before the bargain is concluded. But if the contract of sale be perfect, the purchaser shall pay the price of the things sold, though it should happen to perish before the deliverance of it, provided there was no fault or delay in the seller. For this reason, if the seller has absolutely concluded the agreement of the ransom, and from that time owns himself a debtor for the stipulated sum, remaining no longer as a prisoner, but for the security of the payment; his intervening death does not extinguish the debt, the ransom agreed on remains still due.

If the agreement says, that the ransom shall be paid on a certain day, and the prisoner happens to die before that day, then the heirs are bound to discharge it, for the ransom was due, and the day was assigned, only, as the term for payment.

§ 282.
Of a prisoner released on condition of procuring the release of another.

From the same principles, strictly speaking, it follows, that a prisoner, released on condition of procuring the release of another, should return to prison, in case the latter happened to die before he could procure him his liberty. But certainly such an unfortunate case is entitled to regard, and equity seems to require that this prisoner should continue in the enjoyment of a liberty provided he pays a just equivalent, it being now out of his power to purchase it precisely at the price agreed on.

§ 283.
Of him who is taken a second time before he has paid his first ransom.

If a prisoner fully set at liberty after having promised, but not paid, his ransom, happens to be taken a second time, it is evident that, without being exempted from paying his first ransom, if he is willing to be set at liberty, he must pay a second ransom.

On the contrary, though the prisoner has agreed for the rate of his ransom, if, before the execution of the compact, before he is delivered

§ 284.
Of him who he is delivered

before he
has received
his liberty.

he is set at liberty virtue of it, he be retaken by his party, he owes nothing. I here evidently suppose, that the finishing hand was not put to the compact, that the prisoner had not acknowledged himself debtor for the rate of his ransom. He whose prisoner he was, had as it were only made him a promise of selling, and he had promised to purchase; but the purchase and sale had not actually passed into effect; the property was not actually transferred.

§ 285.
Whether
the things
which a
prisoner
has found
means to
conceal,
belong
to him?

The property belonging, or what belongs to a person does not pass to him who takes him prisoner, unless at the same time he seizes on such things. Of this there is no doubt, especially in our modern times, when prisoners of war do not fall into slavery. And even by the law of nature, the property of a slave's goods does not, without some other reason, pass to the master of the slave. There is nothing in slavery of which this can in itself be the natural effect. If a man obtains a power over the liberty of another, does it follow that he has likewise a right over his property? Therefore if an enemy has not stripped his prisoner, or the latter has found means to conceal something from his search, what he has preserved should belong to him, or he may employ it towards the payment of his ransom. At present even prisoners are not always stripped. If the ravenous soldier runs such lengths, an officer should be above taking the minutest article from them. An English general was taken prisoner at the battle of Rocoux, and though the persons in whose hands he fell were only troopers, they claimed no right to any thing but his arms.

§ 286.
Of the hos-
tage given
for the re-
lease of a
prisoner.

The death of a prisoner puts a period to the right of him who had taken him, therefore an hostage given for the procuring a prisoner's liberty is to be released, the moment the prisoner expires; and if the hostage dies, the prisoner is not released by such death. The reverse of this is true; if one, instead of being an hostage for the other, had been substituted in his stead.

CHAP. XVIII.

Of a Civil War.

§ 287.
Foundation
of the sove-
reign's
right a-
gainst the
rebels.

IT is a question very much debated, whether a sovereign is to observe the common laws of war towards rebellious subjects, who have openly taken up arms against him? A flatterer, or a cruel ruler immediately says, that the laws are not made for rebels, for whom no punishment can be too severe. Let us proceed more mildly, and reason from the incontestible principles above laid down. That we may clearly see how the sovereign is to behave towards revolted subjects, we should first remember, that all the sovereign's rights are derived from those of civil society, from the trust reposed in him, from the obligation he lies under of watching over the welfare of the nation, of procuring

its greatest happiness, of maintaining order, justice, and peace therein (Book I. Ch. IV.) Secondly, we must distinguish the nature and degree of the different disorders which may disturb the state, oblige the sovereign to take arms, or substitute the means of force instead of those of authority.

All subjects unjustly taking arms against the head of a society are termed *rebels*, whether their view be to deprive him of the supreme authority, or whether they intend to resist his commands, in some particular affair, in order to impose conditions on him. § 287. Who are rebels.

Popular commotion is a concourse of people tumultuously assembled, and resist the voice of their superiors, whether their design be against those superiors themselves, or only some private persons. Such violent commotions are common when the people think themselves aggrieved, and are occasioned by no order of men so frequently as the tax-gatherers. If the rage of the malecontents be particularly levelled at the magistrates, or others vested with the public authority, and they proceed to a formal disobedience or violent proceedings, it is called a *sedition*. When the evil spreads, infecting great numbers in the city or provinces, and subsists in such a manner that the sovereign is no longer obeyed, such a disorder custom has more particularly distinguished by the name of *insurrection*. § 289. Popular commotion, insurrection, sedition.

All these violences disturb the public order, and are crimes of state, even when arising from just causes of complaint. For violent measures are interdicted in civil society; the injured party should have recourse to the magistrates, to whom they may apply for redress; and if justice be not obtained from them, their complaints may then be laid at the foot of the throne. Every citizen should even patiently suffer supportable evils, rather than disturb the public peace. Nothing less than a denial of justice from the sovereign, or affected delays, can excuse the furious commotions of a provoked people; they in some measure justify themselves if the evils be intolerable, and the oppressions great and manifest. But what conduct shall the sovereign observe towards the insurgents? I answer in general, that which shall at the same time be most consentaneous to justice, and most salutary to the state. If he is to repress those who unnecessarily disturb the public peace, he is by the same reasoning to shew clemency towards unfortunate persons, to whom just causes of complaint have been given, and who are guilty only in having undertaken to do themselves justice: they have been wanting in patience rather than fidelity. Subjects rising against their prince without cause, deserve severe punishments, yet here the number of delinquents calls for the sovereign's clemency. Shall he depopulate a city, or desolate a province, in punishing their rebellion? Such a chastisement, however just in itself, becomes a cruelty when extended to so great a number of persons. Had the insurrection of the Netherlands against Spain been totally unwar- § 290. How the sovereign is to suppress them.

rantable, every man of virtue would still execrate the memory of the duke of Alva, who made it his boast that he had caused above twenty thousand heads to be struck off by the hands of the common executioner. Let not his sanguinary imitators expect to justify their enormities by necessity. Who was ever more undeservedly insulted by his subjects than Henry the Great of France? His conquests were ever accompanied by an uniform clemency; and at length that excellent prince obtained the success he deserved; he thereby gained over faithful subjects; whereas the duke of Alva lost his master the United Provinces. Crimes common to many are punished by penalties common to the guilty; the sovereign may deprive a town of its privileges, at least till it has fully acknowledged its fault: as for penalties, let them be reserved for the authors of the troubles, for those incendiaries which incite the people to revolt. But tyrants alone will treat, as seditious, those brave and resolute citizens who exhort the people to preserve themselves from oppression in the vindication of their rights and privileges: a good prince will commend such virtuous patriots, provided their zeal be tempered with moderation and prudence. If he has justice and his duty at heart, if he aspires to that immortal and unsullied glory of being the father of his people; let him mistrust the selfish suggestions of a minister, who represents to him as rebels all those citizens who do not hold out their hands to chains, who refuse tamely to suffer the strokes of arbitrary power.

§ 291.
Is to ob-
serve what
he has pro-
mised to
rebels.

The safest, and at the same time the most just way thoroughly to appease seditions, is to give the people satisfaction; and if the insurrection has been without cause, which perhaps has been never the case, still, as we have said, an amnesty is to be granted where the offenders are numerous. When the amnesty is once published and accepted, whatever has passed must be buried in oblivion. No one is to be called to an account for what has been done relative to the disturbances; and, in general, a prince who makes any conscience of his word, is faithfully to keep what he has promised to rebels themselves, I mean to those of his subjects who have revolted without reason or necessity. If his promises are not inviolable, what security have the rebels in treating with him? When they have once drawn the sword, they have nothing to do but, as one of the ancients expresses it, to throw away the scabbard. The prince will then want the mild and salutary means of appeasing a revolt; to exterminate the rebels will be the only expedient remaining. These will become formidable through despair; compassion will bestow succours on them; their party will increase, and the state will be in danger. What would have become of France, if the leaguers had not trusted Henry the Great's promises? The same reasons which should render the faith of promises inviolable and sacred (Book II. § 163, 218, &c. and Book III. § 174.) between individual and individual, between sovereign and sovereign, between enemy and enemy, sub-
sist

subsist in the same force between the sovereign and his subjects, whether insurgents or rebels. However, if they have extorted from him odious conditions, contrary to the happiness of the nation, the welfare of the state, having no right of doing or granting any thing opposite to that grand rule of his conduct and power, he may justly revoke pernicious concessions, availing himself in this proceeding, by the consent of the nation, whom he is to consult, and by the manner and forms pointed out to him by the constitution of the state: but this remedy is to be used with reserve, and only in things of the last moment, that the faith of promises may suffer no violation.

When a party is formed in a state, which no longer obeys the sovereign, and is of strength sufficient to make head against him; or when in a republic the nation is divided into two opposite factions, and both sides take arms; this is called a *civil war*. Some confine this term only to a just insurrection of subjects against an unjust sovereign, to distinguish this lawful resistance from *rebellion*, which is an open and unjust resistance: but what appellation will they give to a war in a republic torn by two factions, or in a monarchy between two competitors for a crown? Use appropriates the term of civil war to every war between the members of one and the same political society. If it be between part of the citizens on one side, and the sovereign with those who continue in obedience to him on the other; it is sufficient that the malecontents have some reasons for taking arms, to give this disturbance the name of *civil war*, and not that of *rebellion*. This last term is applied only to such an insurrection against lawful authority, as is void of all appearance of justice. The sovereign indeed never fails to term rebels all subjects openly resisting him; but when these become of strength sufficient to oppose him, so that he finds himself compelled to make war regularly on them, he must be contented with the term of civil war.

It is foreign from our purpose here to weigh the reasons whereby a civil war is warranted and justified; we have elsewhere treated of the cases wherein subjects may resist the sovereign. (Book I. Chap. IV.) Omitting therefore the justice of the cause, we will consider the maxims to be observed in a civil war, and examine whether it be incumbent on the sovereign to keep within the common laws of war. A civil war breaks the bands of society and government, or at least it suspends their force and effect; it produces in the nation two independent parties, considering each other as enemies, and acknowledging no common judge: therefore of necessity these two parties must, at least for a time, be considered as forming two separate bodies, two distinct people, though one of them may be in the wrong in breaking the continuity of the state, to rise up against lawful authority, they are not the less divided in fact; besides, who shall judge them? who shall pronounce on which side the right or the wrong lies? On earth they have no common superior. Thus they are

§ 292.
Of a civil
war.

§ 293.
A civil war
produces
two inde-
pendent
parties.

in the case of two nations, who have a dispute which they cannot adjust, are compelled to decide it by force of arms.

§ 294.
They are to
observe the
common
laws of war.

Things being thus situated, it is very evident that the common laws of war, those maxims of humanity, moderation, and probity which we have before enumerated and recommended, are in civil wars to be observed on both sides. The same reasons on which the obligation between state and state is founded, render them even more necessary in the unhappy circumstance when two incensed parties are destroying their common country. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals: if he does not religiously observe the capitulations, and all the conventions made with his enemies, they will no longer rely on his word: should he burn and destroy, they will follow his example: the war will become cruel and horrid; its calamities will increase on the nation. The duke de Montpensier's infamous and barbarous excesses against the reformed in France are too well known: the men were delivered up to the executioner, and the women to the brutality of the soldiers. What was the consequence? the reformed became exasperated, they took vengeance of such inhuman practices; and the war, before sufficiently cruel, as a civil and religious war, became more bloody and destructive. Who could without horror read the savage cruelties committed by the baron des Adrets? By turns a catholic, and a protestant, he distinguished himself by his barbarity to both sides. At length there was a necessity of departing from such affectations of juridical superiority against persons who could support their cause sword in hand, and of treating them not as criminals but as enemies. Even troops have often refused to serve in a war wherein the prince exposed them to cruel reprisals. Officers who had the highest sense of honour, though ready to shed their blood in the field of battle for his service, have not thought it any part of their duty to run the hazard of an ignominious death. Therefore, whenever a numerous party thinks it has a right to resist the sovereign, and finds itself able to declare that opinion sword in hand, the war is to be carried on between them in the same manner as between two different nations; and they are to leave open the same means for preventing enormous violences, and restoring peace.

A sovereign having conquered the opposite party, and reduced it to submit and sue for peace, he may except from the amnesty the authors of the troubles, and the heads of the party; may bring them to a legal trial, and on conviction punish them. He may especially act thus with regard to disturbances raised not so much on account of the people's interests as the private views of some great men, and which rather deserve the appellation of *rebellion* than of *civil war*. This was the case of the unfortunate duke of Montmorency: he had taken up arms against the king, in vindication of the duke of Orleans, and being defeated and taken prisoner at the battle of *Castelnaudary*, he lost his life on a scaffold,

fold, by the sentence of the parliament of Toulouse. If he was generally pitied by men of virtue, it is because they considered him not so much a rebel against the king, as opposing the exorbitant power of an imperious minister; and his heroic virtue seemed to warrant the purity of his intentions^o.

When subjects take up arms without ceasing to acknowledge the sovereign, and only to procure a redress of grievances, there are two reasons for observing the common laws of war towards them. First, lest a civil war becoming more cruel and destructive by the reprisals, which, as we have observed, the insurgents will oppose to the prince's severities. 2. The danger of committing great injustice by the hastily punishing those who are accounted rebels, the tumult of discord, and the flame of a civil war, little agree with the proceedings of pure and sacred justice: more quiet times are to be waited for. It will be wise in the prince to secure his prisoners till, having restored tranquillity, he is in a condition of having them tried according to the laws.

As to the other effects which the law of nations attributes to public war, (see Chap. XII. of this Book) and particularly the acquisition of things taken in war; subjects who take arms against their sovereign, without ceasing to acknowledge him, cannot pretend to these effects. The booty alone, the moveable goods carried off by the enemy, are accounted lost to the owners; but this is only on account of the difficulty of knowing them again, and the numberless inconveniences which would arise from the recovery of them. All this is usually settled in the edict of pacification or the act of amnesty.

But when a nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war betwixt the two parties in every respect is the same with that in a public war between two different nations. Whether a republic be torn into two factious parties, each pretending to form the body of the state, or a kingdom be divided betwixt two competitors to the crown, the nation is thus severed into two parties, who will mutually term each other rebels. Thus there are two bodies pretending to be absolutely independent, and who have no judge (§ 293.) they decide the quarrel by arms, like two different nations. The obligation of observing the common laws of war is therefore absolute, indispensable to both parties, and the same to which the law of nature obliges all nations to observe between state and state.

Foreign nations are not to interfere in the constitutional government of an independent state (Book II. § 54.) It is not for them to judge between contending citizens, nor between the prince and his subjects: to them the two parties are equally foreigners, equally independent of their authority. They may however interpose their good offices for the restoration of peace, and

* See the historians of the reign of Lewis XIII.

this the law of nature prescribes to them (Book II. Chap. I.) But if their mediation proves fruitless, they who are not tied by any treaty may, for their own conduct, take the merit of the cause into consideration, and assist the party which they shall judge to have right on its side, in case this party shall request their assistance, or accept the offer of it: I say they may, from the very same reason that they are at liberty to espouse the just quarrel of a nation entering into a war with another. As to the allies of a state distracted by a civil war, they will find a rule for their conduct in the nature of their engagements, combined with the circumstances of the war. Of this we have treated elsewhere, (See Book II. Chap. XII.) and particularly § 196, 197.

THE
L A W
OF
N A T I O N S.

B O O K IV.

Of the Restoration of Peace, and of Embassies.

C H A P. I.

Of Peace, and the Obligation of cultivating it.

PEACE is opposed to war; it is that desirable state in which every one quietly enjoys his rights, or, if controverted, they are discussed with mildness and argument. Hobbes has dared to say, that war is the natural state of man. But if, agreeably to reason, by the natural state of man is understood that to which he is destined and called by his nature, peace should much rather be termed his natural state. For a rational being is to terminate his differences by rational methods; whereas to decide them by force is proper to beasts *. Man, as we have already observed, (Prelim. § 10.) alone and destitute of succours, would necessarily be very miserable; without commerce and the assistance of his species he could have no enjoyment of his life, could not unfold

§ 1.
What
peace is.

* Nam cum sint duo genera decertandi; unum per deceptionem, alterum per vim: cumque illud proprium sit hominis, hoc belluarum: confugiendum est ad posterius, si uti non licet superiori. Cicero de Offic. Lib. I. Cap. II.

his faculties, nor live in a manner suitable to his nature ; all this is to be found only in *peace*. Thus it is in peace that men regard, succour, and love each other : this is so happy a state that they would never quit it, were it not blended by the impetuosity of passion, and the gross deceptions of self-love. What little we have said of the effects of war will be sufficient to give some idea of its various calamities ; and it is a melancholy consideration that the injustice of the wicked should so often render it inevitable.

§ 2.
Obligation
of cultivat-
ing it.

Nations, really humane, which have a serious sense of their duty, and understand their true and substantial interests, will never seek their advantage to the detriment of another ; however intent they may be on their own happiness, they will always take care to unite it with that of others, and with justice and equity. Thus disposed they will necessarily cultivate peace ; if they do not live together in peace, how can they perform those mutual and sacred duties which nature enjoins them ? And this state is found to be no less necessary to their happiness than to the discharge of their duties. So that the law of nature every way obliges them to seek and cultivate peace. This divine law has no other end than the welfare of mankind. To this all its rules, all its precepts tend : they are all deducible from this principle, that men should seek their own felicity ; morality being no more than the science of acquiring happiness. As this is true of individuals, it is equally so of nations, as any one reflecting on what we have said (Book II. Chap. I.) of their common and reciprocal duties, will be easily convinced.

§ 3.
The sove-
reign's obli-
gation to it.

This obligation of cultivating peace binds the sovereign by a double tie. He owes his care to his people, on whom war draws a multitude of evils : and this care is due to them in the most strict and indispensable manner ; government being committed to him only for the advantage of the nation (Book I. § 39.) The same care he owes to foreign nations, whose happiness likewise is disturbed by war. The nation's duty in this respect has been shewn in the preceding chapter ; and the sovereign being invested with the public authority, is charged with all the duties of the society and body of the nation (Book I. § 41.)

§ 4.
Extent of
this duty.

Of this peace, so propitious to mankind, a nation or sovereign should not only avoid disturbing ; they are further obliged to promote it as much as lies within their power, to dissuade others from breaking it without necessity, to exhort them to a love of justice, equity, and the public tranquillity, to a love of peace. It is one of the best offices we can perform to nations, and to the whole universe. What a glorious and amiable appellation is that of peace-maker ! Were a powerful prince rightly acquainted with the advantages of it ; did he represent to himself that pure and effulgent glory which this endearing character offers him, with the gratitude, the love, the veneration and the confidence of nations enjoying happiness under his auspices ; did he know what it is to reign over hearts, he would become the benefactor, the friend,

the father of mankind: and in being so, he would find infinitely more delight than in the most signal conquests. The most glorious period of Augustus's life was, when he shut the temple of *JANUS*, adjusted the disputes of kings and nations, and gave peace to the universe. Here he appears the greatest of mortals, almost divine.

But those disturbers of public peace, those scourges of the earth, who, swayed by a lawless thirst of power, or a haughty and savage disposition, take arms without justice or reason, who sport with the quiet of mankind, and the blood of their subjects; those false heroes, however deified by the injudicious admiration of the vulgar, are in effect the worst of enemies to their species, and deserve to be treated as such. Experience shews how very calamitous war is, even among nations not immediately engaged in it. War disturbs commerce, destroys the properties of men, raises the price of necessaries, spreads too just alarms, obliges all nations to be upon their guard, and keep up, at a great expence, an armed force. Therefore he who breaks peace without cause, necessary injures nations, who are the object of his arms; and by this pernicious example essentially attacks the happiness and safety of every nation on earth. He gives them a right to join in repressing, chastising, and depriving him of a power which he has so enormously abused. What evils does he not bring on his own nation, lavishing its blood to gratify his exorbitant passions, and exposing it to the resentment of confederated enemies! A famous minister of the last century has rendered his memory justly odious to his nation, by involving it in continual wars without either justice or necessity: if by his abilities and indefatigable application he procured distinguished successes in the field of battle, he drew on it, at least for a time, the execration of all Europe.

The love of peace should equally prevent the beginning of war, without necessity, or continuing it when this necessity ceases. A sovereign who, for a just and important cause has been obliged to take arms, may push the operations of war till he has attained its lawful end; which is to procure justice and safety (Book III. § 28.)

If the cause be dubious, the just end of war can be only to bring the enemy to an equitable accommodation (Book III. § 38.) and consequently can be continued no further. On the enemy's offering or accepting such accommodation, a nation is to lay down its arms.

But if it has to do with a perfidious enemy, it would be imprudent to trust either his words or his oaths; we may very justly, and prudence requires it, avail ourselves of a successful war, and push our advantages, till we have broken a dangerous and excessive power, or reduced the enemy to give us sufficient security for his future good behaviour. In fine, if the enemy obstinately rejects equitable conditions, he himself forces us to carry on our attacks to a total and definitive victory, by which he is absolutely

§ 5.
Of the disturbers of public peace.

§ 6.
How far war may be continued.

absolutely reduced and subjected. The use to be made of victory has been shewn above (Book III. Chap. VIII. IX. XIII.)

§ 7.
Peace the
end of war.

When one of the parties is reduced to sue for peace, or both are weary of the war, an accommodation is proposed, and conditions agreed on. Thus peace puts a period to the war.

§ 8.
General
effects of
peace.

The general and necessary effects of peace are reconciliation of enemies, and the cessation of hostilities on both sides: it restores the two nations to their natural state.

C H A P. II.

Of Treaties of Peace.

§ 9.
Definition
of a treaty
of peace.

WHEN the powers at war have agreed to lay down their arms, the agreement or contract on which they stipulate the conditions of peace, with the manner in which it is to be restored and supported, is called the *Treaty of Peace*.

§ 10.
By whom it
may be
concluded.

The same power who has the right of making war, of declaring or directing its operations, has naturally that likewise of making and concluding the treaty of peace. These two powers are connected together, and the latter naturally follows from the former. If the conductor of the state is empowered to judge of the causes and reasons for which war is to be undertaken; of the time and circumstances when it is proper to begin it; of the manner in which it is to be supported and carried on; he therefore has likewise a right to limit its course, to appoint the end of it, and to make peace. But this power does not necessarily include that of offering or accepting any conditions with a view of peace; though the state has intrusted to the prudence of its conductor the general care of determining war and peace, yet the fundamental laws may have limited his power in many things. Accordingly Francis I. King of France had the absolute disposal of war and peace, yet in the assembly at Cognac he declared, that to alienate by a treaty of peace any part of the kingdom, was out of his power. (See Book I. § 265.)

A nation having the free disposal of its domestic affairs, and of the form of its government, may commit to a person or an assembly, the power of making peace, without leaving it also that of making war. Of this we have an instance in Sweden; where, since the death of Charles XII. the king cannot declare war without the consent of the states assembled in a diet: but he may make peace in conjunction with the senate. It is less dangerous for a people to intrust its conductors with this last power than with the former. It may reasonably be expected that they will not make peace till it suits with the interest of the state. But their passions, their own interest, their private views, too often influence their resolutions when a war is in question. Besides, a peace must be wretched indeed, not to be better than war.

On

On the contrary, to exchange peace for war is always very hazardous.

When a limited power is authorised to make peace, as he cannot of himself grant every condition, in order to treat on sure grounds with him, it must be required that the treaty of peace be approved by the nation or the power which can make good the conditions. If, for instance, in treating of a peace with Sweden a defensive alliance and a guarantee be required for the condition, this stipulation will be of no effect, unless approved and accepted of by the diet, which alone has the power of imparting validity to it. The kings of England conclude treaties of peace and alliance, but, by these treaties, they cannot alienate any of the possessions of the crown without the consent of parliament; neither can they, without the concurrence of the same body, raise any money in the kingdom. Therefore, when they negotiate any treaty of subsidies, it is their constant rule to communicate the treaty to the parliament, that they may be certain of its concurrence to make good such engagements. The emperor Charles V. requiring of Francis I. his prisoner, such conditions as this king could not grant without the consent of the nation, should have detained him till the treaty of Madrid had been approved, and the states-general of France and Burgundy had acquiesced in it: thus he would not have lost the fruit of his victory by an oversight, very surprising in a prince of his capacity.

We shall not here repeat what we have said above concerning the alienation of a part of the state (Book I. § 263, &c.) or of the whole state (ibid. § 68, &c.) only let us observe that, in case of a pressing necessity, and the events of an unfortunate war, the alienations made by the prince for saving the remainder of the state, are considered as approved and ratified by the mere silence of the nation, when, in the form of its government, it has not retained some easy and ordinary method of giving its express consent, and has lodged an absolute power in the prince's hands. The states-general are abolished in France, by long use and the tacit consent of the nation: therefore, in any calamitous exigency, the king alone is judge by what sacrifices peace is to be purchased, and his enemies treat on a sure footing with him. It would be a vain plea in the people to say, that it was only through fear that they had suffered the abolishment of the states-general. However, they have suffered it, and thereby all the necessary powers for contracting with foreign states in the name of the nation, are transferred to the king. In every nation there must necessarily be some power with which others may treat on a secure basis. A certain historian * says, *that by the fundamental laws the kings of France may not renounce any of their rights, to the prejudice of their successors, by treaties either free or forced.* The fundamental laws may indeed with-hold from the king the

§ 11.
Of alienations made by a treaty of peace.

* L'Abbé de Choisy, Histoire de Charles V. p. 492.

power of alienating, without the nation's consent, what belongs to the state; but they cannot invalidate an alienation or renunciation made with that consent. And if a nation has permitted things to come to such extremities as to leave it without any means of expressly declaring its consent; on these occasions its silence alone is a real tacit consent. Otherwise there would be no such thing as treating on sure grounds with such a state: and thus previously to vacate all future treaties would be countervailing the law of nations, by which the means of treating together are to be retained (Book I. § 262.) and their treaties to be observed (Book II. § 163, 219, &c.) In fine, it must be observed that, in our examination, whether the consent of the nation be requisite for alienating some part of the state, we mean such parts as are still belonging to the nation, and not any which during the war are fallen under the power of the enemy. For these being no longer possessed by the nation, the sovereign alone, if invested with the full administration of the government, the power of war and peace; he alone, I say, may judge whether it be convenient to relinquish those parts of the state, or to continue the war for the recovery of them. And though it should be pretended that he cannot of himself make any valid alienation; yet, according to our supposition, that is, if invested with a full and absolute power, he has, I say, a right to promise that the nation shall not take up arms again for the recovery of those lands, towns, or provinces, which he relinquishes: and this suffices for securing the quiet possession of them to the enemy, into whose hands they are fallen.

§ 12.
How the
sovereign
may in a
treaty dis-
pose of
what con-
cerns indi-
viduals.

The necessity of making a peace authorises the the sovereign to dispose of things even belonging to private persons, and the eminent *Domain* gives him this right (Book I. § 244.). In some degree, by virtue of the power which he has over all his subjects, he may dispose of their persons. But these cessions being made for the common advantage, the state is to indemnify the citizens who are sufferers by them (*ibid.*).

§ 13.
Whether a
king, being
a prisoner
of war,
can make
peace.

Every impediment by which the prince is disabled from administering the affairs of the government, undoubtedly takes away from him the power of making peace. Thus a king, when a minor or non compos, cannot treat of peace: this stands in need of no proof. But the question is, whether a king, when a prisoner of war can make peace, and whether a treaty thus concluded be valued? Some authors of repute* here distinguish betwixt a king whose kingdom is patrimonial, and another who has only the *usufructus* of it. This false and dangerous idea of a patrimonial kingdom we have overthrown (Book I. § 68, &c.) and evidently shewn it reducible only to the power the sovereign is intrusted with, of nominating his successor, and when he judges it proper, to dismember some parts of it: but always for the good of the nation, and with a view to its greater advantage.

* Vide Wolf. Jus. Gent. Sect. 282.

Every legitimate government, whatever it be, is established solely for the good and welfare of the state : this incontestible principle being once laid down, peace is no longer the peculiar province of the king ; it belongs to the nation. Now it is certain that a captive prince cannot rule the nation, or perform the functions of government. How shall he who is not free command a nation ? How can he govern it to the advantage of the people, and to the public welfare ? He does not indeed forfeit his rights, but his imprisonment deprives him of the ability of exercising them ; not being in a condition to direct the use of them, to their proper and legal end. It is the same case as that of a king who is a minor, or under a disorder of mind ; then he or they who, by the laws of the state, are called to the regency, take the reins of government ; they are, by the laws, invested with a power to treat of peace, to stipulate the conditions, and to bring it to a legal conclusion.

The captive sovereign may negotiate it himself, and promise what depends on him personally ; but the treaty does not become obligatory to the nation till ratified by its representatives, or the depositaries of the public authority during the captivity of the prince, or lastly, by himself after his release.

However, if the state is, as far as possible, to procure the release of the least citizen, who has lost his liberty for the public cause, this obligation is much towards its conductor, whose cares, attention, and labours are devoted to the common safety and welfare. It is in fighting for his people that a prince, made prisoner of war, is fallen into a condition, which to a person of such an exalted rank, is the depth of misery ; and shall this same people grudge any sacrifice to deliver him ? On so melancholy an occasion, nothing less than the very safety of the state is to be spared. But in every exigency the safety of the people is the supreme law ; and in so severe an extremity a generous prince will imitate the example of the heroic Regulus. This hero, who being sent back to Rome on his parole, dissuaded the Romans from delivering him by a scandalous treaty, though he was not ignorant of what tortures he should suffer on his return, from the illegal cruelty of the Carthaginians *.

When an unjust conqueror, or any other usurper, having invaded the kingdom, on the people submitting to him, and by a voluntary homage acknowledging him for their sovereign, he is in possession of their regality. Other nations, as having no right to concern themselves in the domestic affairs of this nation, or to interfere in its government, are to abide by its judgment, and conform to the possession ; therefore they may treat of a peace with the usurper, and conclude it with him. Herein they do not injure the right of that lawful sovereign ; it is not their concern to examine and judge of this right ; they leave it as it is, and in their transactions with this kingdom,

§ 14.
Whether
peace can
be made
with an
usurper.

* Tit. Liv. Epitom. Lib. XVIII. and other historians.

attach themselves solely to the possession, according to their own right, and that of the state whose sovereignty is contested. But this rule does not preclude them from espousing the quarrel of a dethroned king, and assisting him, if he appears to have justice on his side: they then declare themselves enemies of the nation which has acknowledged his rival, as when two different nations are at war, they are at liberty to assist that whose quarrel they shall think has the fairest appearance.

§ 15.
Allies included in the treaty of peace.

The principal party, the sovereign, in whose name the war was made, cannot justly make a peace exclusively of his allies: I mean those who have assisted him, not directly taking part in the war. This is a precaution necessary for securing them from the enemy's resentment; for though one party is not to be offended with the allies of its adversary, who being engaged only on the defensive, faithfully make good their treaties (Book I. § 101.) yet is it too common that passions determine the measures of men preferably to justice and reason. If these allies are become such only since the war, and on account of this same war, though they do not enter into it with their forces, nor directly as principals, yet they give him against whom they join, a just cause to treat them as enemies; he therefore whom they have thus assisted, is not to omit including them in the peace.

But the treaty of the principal party obliges its allies no farther than as they are willing to consent to it; unless they have given him full power to treat for them. By comprehending them in his treaty, all he can require of his reconciled enemy is not to attack his allies on account of the succours they furnished against him; not to molest them, but to live in peace with them as if nothing had happened.

§ 16.
Associates each to treat for himself.

Sovereigns who have associated in a war, or who have directly taken part in it, are respectively to make their treaty of peace each for himself: this was the practice at Nimeguen, Reifwick, and at Utrecht. But the alliance obliges them to treat in concert. To know in what cases an associate may detach himself from the alliance, and make his separate particular peace, is a question which we have examined in treating of associations in war (Book III. Chap. VI.), and of alliances in general (Book II. Chap. XII. and XV.).

§ 17.
Of mediation.

Two nations, though equally weary of the war, often continue it merely from a fear of making the first advances to an accommodation, as these might be imputed to weakness; or they persist in it from animosity, and against their real interest. Then common friends effectually interpose, offering themselves for mediators. And there cannot be a more beneficent office, and more becoming a great prince, than that of reconciling two nations at war, and thus putting a stop to the effusion of human blood. This is an indispensable duty to those who are possessed of the means for succeeding in it. This is the only reflection we shall make here on a subject we have already discussed (Book II. § 328.).

A treaty of peace can be no more than an agreement. Were the rules of an exact and precise justice to be observed in it, each punctually receiving all that belongs to him, a peace would become impossible. First, with regard to the very subject which occasioned the war, one of the parties must acknowledge himself in the wrong, and condemn his own unjust pretensions; which he will hardly do, unless reduced to the last extremities: but if he owns the injustice of his cause, all he has done in support of it, he falls likewise under condemnation. He must restore what he has unjustly taken, must reimburse the charges of the war, and repair its damages. And how shall we make a just estimate of all the damages; what price is to be set on all the blood that has been shed, the loss of such great numbers of citizens, and the ruin of families? Nor is this all, strict justice would farther demand, that the author of an unjust war should undergo a penalty proportionable to the injuries for which he owes a satisfaction, and such as might insure the future safety of him he has attacked. How shall the nature of this penalty be determined, and the degree of it be precisely regulated? In fine, even he who had justice on his side may have transgressed the limits of a just defence, may have exceeded in hostilities, though the end of them was lawful: wrongs for which strict justice would demand a reparation. He may have made conquests and taken a booty beyond the value of his claim. Who shall make an exact calculation, a just estimate of this? Thus, as it would be dreadful to perpetuate the war, to prosecute it till the total ruin of one of the parties, and as in the most just cause we are never to lose sight of the restoration of peace, are constantly to tend towards this salutary view, no other way is left than to agree on all the claims and grievances on both sides, and to extinguish all difference by the most equitable convention which the juncture will admit of. Not so much as the cause of the war is decided in them, nor the controversies to which the several acts of hostilities might give rise; and neither one or other of the parties condemned as unjust. This is what would seldom be allowed: but the negotiations turn only on what each is to have as a total extinction of all pretensions.

The effect of the treaty of peace is to put an end to the war, and to abolish the subject of it. It leaves the contracting parties without any rights of committing hostility, either for the very subject which kindled the war, or for what has passed in the course of it: it is therefore no longer permitted to take up arms again for the same cause. Accordingly, in these treaties, the parties reciprocally oblige themselves to a *perpetual peace*, which is not to be understood as if the contracting parties promised never to make war on each other, for any cause whatever. Peace relates to the war which it terminates; and as it forbids the revival of the same war by taking arms for the cause which at first kindled it, is in reality perpetual.

However,

§ 18.
On what
footing
peace is to
be con-
cluded.

§ 19.
General ef-
fect of the
treaty of
peace.

However, the special agreement on a cause extinguishes only the mean to which it relates, and is no objection against any subsequent pretensions to the same thing on other foundations: care is therefore usually taken to require a general agreement to the thing itself in contest, and not merely to the contest depending. A general renunciation of every pretension whatsoever to the thing in question is stipulated for: and thus, though the party renouncing might hereafter be able to demonstrate by new reasons that the thing did really belong to him, his claim would not be admitted.

§ 20.
Of an am-
nesty.

An amnesty is a perfect oblivion of what is past; and the end of peace being to extinguish all subjects of discord, this should be the leading article of the treaty. This accordingly at present is the constant rule. But though the treaty should be wholly silent on this head, the amnesty, by the very nature of peace, is necessarily implied in it.

§ 21.
Of things
not men-
tioned in
the treaty.

As every power at war pretends to have right on its side, and this pretension is not liable to be judged by others (Book III. § 188.) the state of things at the instant of the treaty is to be held legitimate, and any change to be made in it requires an express specification in the treaty; consequently, all things not mentioned in the treaty are to remain as they were at the conclusion of it. This is also a consequence of the promised amnesty. All the damages caused during the war are likewise buried in oblivion: and no plea is allowable for those the reparation of which is not mentioned in the treaty: they are looked on as if they never had happened.

§ 22.
Of things
not includ-
ed in the
amnesty.

But the effect of the agreement or amnesty cannot be extended to things of no relation to the war concluded by the treaty. Thus claims founded on a debt, or an injury prior to the war, but which made no part of the reasons for undertaking it, remain entire, and are not abolished by the treaty, unless it be formally extended to the extinction of every claim whatever. It is the same with debts contracted during the war, but for causes of no relation to it: or with injuries likewise done during the course of the war, but foreign to the state of it.

Debts contracted with individuals, or injuries which they may have received without relation to the war, are likewise not abolished by the agreement and amnesty; these relating only to their object, that is, the war, its causes and effects. Thus two subjects of powers at war, having made a contract together in a neutral country, or one having received there an injury from the other, the accomplishment of the contract or the reparation of the injury and damage may be prosecuted after the conclusion of the treaty of peace.

Lastly, if the treaty expresses that all things shall be restored to the state in which they were before the war, this clause means only immoveables, and cannot be extended to moveables, to booty, the property of which immediately passes to those who make

make themselves masters of it; and, on account of the difficulty of knowing it again, and of the little hopes of recovering it, is accounted to be relinquished by the former proprietor.

Preceding treaties mentioned and confirmed in the last, make a part of it; no less than if they were literally included and transcribed in it: and any new articles relating to former conventions are to be interpreted according to the rules above-mentioned (Book II. Chap. 17.), and particularly in paragraph 286.

§ 23.
Former
treaties re-
vived and
confirmed
in the new
are a part
of it.

C H A P. III.

Of the Execution of the Treaty of Peace.

A TREATY of peace binds the contracting parties from the moment of its conclusion; as soon as it had passed through all its forms. And they are without delay to procure the execution of it. From that time all hostilities cease, unless a day be specified when the peace is to take place. But this treaty becomes obligatory to subjects only from the time of its being notified to them. It is here as in a truce (Book III. § 239.) Should military persons commit some hostilities within the extent of their functions, and pursuant to the rules of their duty, before they have any authentic information of the treaty of peace, it is a misfortune for which they are not punishable; but the sovereign, who was before obliged to peace, is to cause whatever has been taken since the conclusion to be restored: he has no manner of right to any detention.

§ 24.
When the
obligation
of the treaty
commences.

And for preventing those unhappy accidents, by which many innocent persons may lose their lives, public notice is to be given of the peace without delay, at least to the troops. But at present, as the people cannot of themselves undertake any act of hostility, and do not concern themselves in the war, the solemn proclamation of the peace may be deferred, care being taken that all hostilities cease, which is easily done by means of the generals who direct the operations, or by proclaiming an armistice at the head of the armies. The peace in 1735, betwixt the emperor and France was not proclaimed till a long time after, being delayed till the treaty was maturely digested; the most important points having been adjusted in the preliminaries. The publication of the peace replaces the two nations in the state they were in before the war. It again opens a free trade betwixt them, and allows to the subjects on both sides what had been interdicted to them by the state of war. On the publication the treaty becomes a law to the subjects, and they are obliged to conform to the articles stipulated therein. If, for instance, the treaty imports that one of the two nations shall abstain from a particular trade, every subject of that nation, from the time of the treaty's being made public, is to renounce that trade.

§ 25.
Publication
of the
peace.

D d

When

§ 26.
Of the time
of the exe-
cution.

When no term is assigned for the accomplishment of the treaty, and the execution of the several articles, common sense dictates that every point should be executed as soon as possible; and doubtless this was so intended. The faith of treaties equally excludes from the execution of them all neglect, all dilatoriness, and deliberate delays.

§ 27.
A lawful
excuse to
be admit-
ted.

But here, as every where else, a legitimate excuse, founded on a real and insurmountable obstacle, is to be admitted; no body being bound to impossibilities. The obstacle, when the promise is not in fault, vacates a promise which cannot be made good by an equivalent, nor the performance of it be referred to another time: if the promise can be fulfilled on another occasion, a proper delay must be granted. A nation has by treaty of peace promised to the other a body of auxiliary troops, yet should the former happen to stand in urgent need of them for her own defence, she is not bound to furnish them: if she has promised a certain yearly quantity of corn, it cannot be demanded should she labour under a scarcity; but, on the return of plenty, she is, if required, to make up the arrears.

§ 28.
The pro-
mise is at
an end
when the
party to
whom it is
made, him-
self hinders
the per-
formance
of it.

A farther maxim is, that the promiser is cleared of his promise, when being about to fulfil it, according to the terms of the engagement, he to whom it was made has himself hindered the execution of it. He is accounted to remit a promise, who himself hinders its execution. It must be likewise added, that if he who promised a thing by a treaty of peace, was ready to perform it at the time agreed on, or immediately, or at a proper time, if there was no fixed term; and that the other party would not admit of it, the promiser is discharged of his promise; for the acceptor, who has not reserved to himself the right of fixing the execution at his pleasure, is accounted to renounce it by not accepting of it at a proper time, and for which the promise was made. Should he desire that the performance be deferred till another time, the promiser in good faith should consent to the prolongation, unless he can shew, by very good reasons, that the promise would then become more inconvenient.

§ 29.
Cessation
of contri-
butions.

To raise contributions is an act of hostility, which, on the conclusion of the peace, is to cease (§ 24.) Those before promised, and not yet paid, are due, and may be required as a debt. But for avoiding all difficulty, these kinds of articles are to be clearly and particularly discussed, and care is generally taken that they are so.

§ 30.
Of the pro-
ducts of
the thing
restored or
ceded.

The products restored on a peace are due from the instant fixed for the execution; if there be no fixed term the products are due from the moment the restitution of the things was granted; but those which were due or collected before the conclusion of the peace, are not to be delivered up; for the fruits belong to the proprietor of the stock, and here possession is accounted a lawful title. From the same reason the cession of a fund does not imply that of the produce anteriorly due. This Augustus justly main-

maintained against Sextus Pompeius, who, on having the Peloponnesus given to him, claimed the imposts of the former years *.

Things, the restitution of which is in the treaty of peace, stipulated simply without any explication, are to be restored in the condition they were taken, the word restitution naturally signifying the re-establishment of all things to their former condition. Thus the restitution of a thing is to be accompanied with all the rights annexed to it when taken: but under this rule are not to be comprehended the alterations which may have been a natural consequence, an effect of the war itself, and of its operations. A place is to be restored in the condition it was in when taken, as far as it shall be still in that condition, at the conclusion of the peace. But if during the war the place has been razed or dismantled, this was no more than the right of arms; and the amnesty extinguishing this damage, there is no obligation of repairing a ravaged country on restoring it at a peace: it is restored as it is. But it would be a flagrant perfidy to waste this country after the conclusion of the peace: it is the same with a place whose fortifications have escaped the destructions of war; to dismantle it previously to the restitution of it would be an infamous prevarication. If the conqueror has repaired the breeches, has put it in the condition it was in before the siege, in this condition he is to restore it; indeed if he has added any new works, these he may demolish. If he has razed the antient fortifications, and constructed others, it will be necessary to agree about this improvement, and precisely to state in what condition the place shall be restored. It is even proper for preventing all chicane and difficulty, never to omit this last precaution. An instrument appointed for restoring peace should leave, as far as possible, nothing which may rekindle the war; this, I know, is not the method of those who at present account themselves the most dexterous negotiators. They, on the contrary, study to insinuate into a treaty of peace obscure and ambiguous clauses, that their master may have a pretence for a fresh quarrel, and of taking up arms again. How contrary this wretched finess is to the faith of treaties we have already observed (Book II. § 231.); it is unworthy of that candour and magnanimity which should adorn the actions of a prince.

But it being very difficult, though the treaty be drawn up with the greatest care and candour, to avoid all manner of ambiguity, or that some difficulty shall not occur in the application of its clauses to particular cases, recourse must often be had to the rules of interpretation. We have bestowed a whole chapter on the exposition of these important rules †, and now, instead of repetitions, I shall only mention some rules more particularly relative to the point in question; I mean the interpretation of treaties of peace. 1. In case of doubt the interpretation goes against him

§ 31.

In what condition things are to be restored.

§ 32.

The interpretation of a treaty of peace is to be against the superior party.

* Appian de Bell. Civ. Lib. V. quoted by Grotius, Lib. II. Cap. XX. Sect. 24.

† Book II. Chap. XVII.

who gave law in the treaty; for as it was in some measure dictated by him, he is in fault in neglecting to express himself more clearly; therefore in extending or restraining the signification of the terms within the meaning, the least favourable to him, no injury is done him, or at least only that to which he has willingly exposed himself; whereas, by a contrary interpretation, there would be a risque of turning vague or ambiguous terms into so many snares against the weakest contractor, who has been obliged to accept of what the former dictated.

§ 33.
Of the
name of
ceded
countries.

2. The name of countries ceded by treaty is to be understood according to the use then received among men of parts and capacity; for it is not to be supposed that weak and ignorant persons will be employed in such a concern as a treaty of peace: and the articles of a contract are to be understood of what the contractors probably had in their mind, it being for what they have in their mind that they contract.

§ 34.
Restitution
not to be
understood
of those
who have
voluntarily
given them-
selves up.

3. The treaty of peace naturally and of itself relates only to the war, which it puts an end to. Therefore it is only in such relation that its vague clauses are to be understood. Thus the simple stipulation of restoring things to their condition does not relate to changes which have not been occasioned by the war itself: consequently this general clause cannot oblige one of the parties to set at liberty a free people, who have voluntarily given themselves up during the war. And as a people, when relinquished by its sovereign, becomes free, and may provide for its safety as it thinks best, (Book I. § 202.), if this people, in the course of the war has of their own accord, without any military compulsion, submitted or given themselves up to the enemy of their former sovereign, the general promise of restoring conquests shall not extend to this people. It is to no purpose to say, the freedom of the first mentioned people may concern him, who requires that all things should be restored on its ancient footing, and that the restoration of the second is manifestly of very great concern to him. If he wanted what the general clause does not comprehend in itself, he should have been more clear and express in his terms. All kinds of conventions may be inserted in a treaty of peace; but if they bear no relation to the war which is now terminating, they must be very expressly specified; for the treaty is naturally understood only of its object.

CHAP. IV.

Of the Observation and Breach of the Treaty of Peace.

§ 35.
The treaty
of peace
obliges the
nation and
successors.

THE treaty of peace concluded by a lawful power is undoubtedly a public treaty, obligatory to the whole nation (Book II. § 154.) It is likewise, by its nature, a real treaty; were it made only for the prince's life, it would be no more than a treaty

a treaty of truce, and not of peace; besides, every treaty which, like this, is made with a view to the public good is a real treaty (Book II. § 189.). Therefore it obliges successors, no less than the prince himself who signed it, since it obliges the state itself; and successors can never have, in this respect, any other rights than those of the state.

After all we have said on the faith of treaties, and the indispensable obligation of them, it would be superfluous to use many words in shewing how religiously treaties of peace are to be observed both by sovereigns and people. These treaties concern and bind whole nations, they are of the utmost importance; the breach of them certainly rekindles the war: reasons which add a new force to the obligation of keeping our faith, and punctually fulfilling our promises.

To alledge that a treaty of peace was complied with through fear, or extorted by force, does not invalidate the observance. First, were this exception admitted, it would sap the very foundations of all securities and conventions; there being very few which might not be made to afford such a pretence. To authorise such an evasion would be to hurt the common safety and welfare of nations: the maxim would be execrable by the very same reasons which have universally established the sacredness of treaties (Book II. §. 220.). Besides, to alledge such an exception would generally be disgraceful and ridiculous. It is seldom, even in our days, that a stand is made to the last extremities, before making a peace. A nation after the loss of several battles may still defend itself; whilst it has men and arms remaining it is not without resource. If it thinks fit, by a disadvantageous treaty, to procure itself a necessary peace; if by great sacrifices it delivers itself from an imminent danger or total ruin, what still remains is a good which it owes to peace; it has freely determined itself to prefer a certain and present, but limited loss, to a danger, indeed to come, but too probable and very terrible.

If ever the exception of constraint may be alledged, it is against an act which does not deserve the name of a treaty of peace, against a forced submission to conditions equally offensive to justice and all the duties of humanity. If a rapacious conqueror subdues a nation, forces it to accept of hard ignominious and insupportable conditions, necessity then obliges it to a submission. But this apparent quiet is no peace; it is an oppression endured, whilst means are wanting for shaking it off, and against which men of spirit rise on the first favourable opportunity. When Ferdinand Cortes fell on the empire of Mexico without any shadow of reason, without the least apparent pretence; if the unfortunate Montezuma could have recovered his liberty by submitting to the iniquitous and cruel conditions of receiving a Spanish garrison into his towns, and his capital, of paying an immense tribute, and obeying the king of Spain's orders, will it seriously be said that he might not lay hold of an opportunity for reinstating himself in his rights, and delivering his people; for exterminating

ravenous and sanguinary usurpers? No, such a monstrous absurdity can never meet with any real defenders. The law of nature taking care of the safety and repose of nations, and enjoining fidelity in promises, cannot favour oppressors. All its maxims tend to the greatest good of mankind: that is, the great end of laws and rights. He who himself breaks all the bounds of human society, shall he shelter himself under them? If a people abuses this maxim, rises unjustly, and renews the war, this inconvenience is still more eligible than that usurpers should be furnished in an easy way of perpetuating their violences, and settling their usurpation on a solid foundation. But were this doctrine, so contradictory to all the motions of nature, to be preached, who would be brought to believe it?

§ 38.
How many ways a treaty of peace may be broke.

Therefore equitable or at least supportable agreements alone deserve the appellation of treaties of peace; they are such wherein the public faith is engaged, and which are faithfully to be observed, though in some respects harsh and burdensome. The consent of the nation to it shews that in the condition it was in, still considered it as a good, and its word demands its respect. Were men allowed to undo at one time what they do at another, there would be an end of all stability and confidence.

To break a treaty of peace is to violate the engagements of it, either in doing what it prohibits, or in not doing what it prescribes. Now engagements in a treaty may be violated in three different manners: either by a conduct contrary to the nature and essence of every treaty of peace in general; by proceedings incompatible with the particular nature of the treaty; or by an intentional breach of any of its articles.

§ 39.
First, by a conduct contrary to the nature of every treaty of peace.

First, a nation acts against the nature and essence of every treaty of peace, nay against peace itself, in disturbing it without cause, either by taking arms and renewing the war without so much as a plausible pretence, or in deliberately and wantonly offending him with whom peace has been made; and treating him or his subjects in a manner incompatible with peace, and which he cannot suffer without being wanting to himself. It is likewise acting against the nature of all treaties of peace to take arms for the same cause which had recently terminated the war, or in resentment of some occurrence during the hostilities. If, at least, some specious pretence, borrowed from a fresh cause, cannot be pleaded, there is a manifest revival of the war which had been terminated, and the treaty of peace is flagrantly broken.

§ 40.
To take arms for a fresh cause is no breach of the treaty of peace.

But to take arms for a subsequent cause is not breaking the treaty of peace; for though a promise has been given to live in peace, it was not therein promised to suffer injuries, damages, and wrongs of all kinds, rather than procure justice by force of arms. The rupture proceeds from him, who, by his obstinate injustice, renders this method necessary.

But here must be remembered what we have observed more than once, namely, that nations acknowledge no common judge on earth, that they can mutually condemn each other without appeal,

apel, and that they are at last obliged to act in their quarrels as if each was equally in the right. On this footing, whether the new cause occasioning the war be just or not; neither he who makes it a handle for taking up arms, nor he who refuses satisfaction, is reputed to break the treaty of peace, provided the cause of complaint and the refusal of satisfaction have respectively, some colour at least, so as to render the question incontrovertible; and when nations can come to no accommodation about the point in dispute, the only way remaining to them is that of arms. Then it becomes a fresh war abstractedly from the treaty.

And, as in making peace a nation does not thereby give up its right of making alliances, and assisting its friends, it is likewise no breach of the treaty of peace, if to make a subsequent alliance with, and join the enemies of him with whom such treaty was concluded, to espouse their quarrel and unite its arms with theirs, unless the treaty expressly prohibits such connections. It is at most but beginning a fresh war in behalf of a foreign cause.

§ 41.
A subsequent alliance with an enemy is likewise no breach of a treaty.

But these new allies I suppose have some specious pretence for taking arms, and that there are good and just reasons for supporting their quarrel. Otherwise to unite with them, just as they are entering on the war, or when they have begun it, would be manifestly seeking a pretence to elude the treaty of peace; would be breaking it by a fraudulent perfidy.

It is of great importance that a new war should be distinguished from the breach of a treaty of peace; the rights acquired by such treaty still subsisting, notwithstanding the new war; whereas, they are annulled by the breach of the treaty on which they were founded. Indeed he who had ceded these rights unquestionably, during the war, interrupts, as far as in his power, the exercise of them; and he may, by the law of war, intirely wrest them from his enemy, as he may his other possessions. But then he holds these rights as things taken from the enemy, who, on a new treaty of peace, may urge the restitution of them. In these kinds of negotiations the difference is very great betwixt demanding the restitution of what we were possessed of before the war, and requiring new concessions: any little equality in the successes suffices for insisting on the former; the latter is obtainable only by a superiority. It often happens that when the fate of arms has been nearly equal, both sides agree to restore their conquests, and put every thing in its former condition. And then, if it was a new war, the former treaties subsist: but if they have been broken by taking up arms again, and the first war be revived, these treaties continue vacated, and in order to the revival of their force, they must be expressly specified and confirmed in the new treaty.

§ 42.
Why a distinction is to be made betwixt a new war and the breach of the treaty.

The question we are treating of also greatly concerns other nations, which may be so far interested in the treaty that their own affairs require them to maintain its observance. To guarantees of the treaty, if there are any, it is essential, as likewise

to allies, for distinguishing the case when their succours are due. In fine, he who breaks a solemn treaty is much more odious than the other, who, after making an ill-grounded demand, supports it by arms. The former adds perfidy to injustice: he strikes at the foundation of the public tranquillity; and as he thereby injures all nations, they have just cause of uniting against him, to check and punish so pernicious an example. Therefore as we are to be reserved in imputing to another what is most odious, Grotius justly observes, that in case of doubt, and when the taking up arms can be vindicated by some specious pretence founded on a new cause, *it is better to suppose, in the fact of him who takes up arms again, an injustice or separate perfidy, than to account him at once guilty both of perfidy and injustice* *.

§ 43.
A just self-
defence no
breach of
the treaty.

A just self-defence does not violate the treaty of peace: it is a natural right, not to be renounced; and in promising to live in peace we promise no more than not to attack without cause, and to abstain from injuries and violence. But there are two ways of defending ourselves or our properties: sometimes the violence admits of no other remedy than force; and then the use of it is intirely lawful. On other occasions there are milder ways of obtaining reparation for the damage and injury; and the last should always to be preferred. Such is the conduct to be observed by two nations desirous of maintaining peace, when the subjects of both sides have broke out into some violence. Present force is checked and repelled by force. But in prosecuting the reparation of injuries and a just satisfaction, the sovereign of the offenders is to be applied to: there is no following them into his country, and having recourse to arms, till after a denial of justice. If there be reason to fear that the delinquents will escape, as for instance, if unknown persons, natives of a neighbouring country, have made an irruption into our territories, we have a right to pursue them sword in hand, into their own country till they are seized; and provided they commit no hostilities against innocent persons, their sovereign can consider our proceeding only as a just and legitimate defence.

§ 44.
1st. Of the
causes of
rupture for
the sake of
allies.

When the principal contracting party has included his allies in the treaty, their cause in this respect is common to him, and these allies are equally with him, to enjoy all the conditions essential to a treaty of peace; so that whatever is capable of breaking the treaty, if committed against himself, breaks it equally in being committed against the allies, which he has caused to be included in his treaty. If the injury be done to a new ally, or who is not included in the treaty, it may produce a fresh cause of war, but does not weaken the treaty of peace.

§ 45.
2d A treaty
is broken
by what is
opposite to
its particu-
lar nature.

The second method of breaking a treaty of peace is to do any thing contrary to what the particular nature of the treaty requires. Thus every proceeding contrary to friendship breaks a treaty of peace made with the express condition of living henceforth like

* Lib. III. Cap. XX. Sect. 23.

good friends. To favour a nation's enemies, to insult its subjects, to molest its trade without reason, or without any grounds to prefer another nation to it; to refuse assisting it with provisions when it may be conveniently done; to protect its factions or rebellious subjects, and shelter them: all these are proceedings evidently opposite to friendship. To these according to circumstances may be added the following: To build fortresses on the frontiers of a state, to express a mistrust of it, to raise troops without making known the occasion of it, and refuse such explanation, &c. But to shelter exiles, to receive subjects quitting their country without any intention of hurting it by their departure, but for the advantage of their private affairs; charitably to receive emigrants quitting their country to enjoy a freedom of conscience; in such proceedings there is nothing incompatible with the quality of friend. The particular laws of friendship are not to discharge us, according to the caprice of our friends, from the common duties we owe the rest of mankind.

Lastly, the peace is broken by the violation of any of the express articles of the treaty. This third manner of breaking it is the most decisive, the least susceptible of chicanery and evasions. Whoever fails in engagements, as far as in him lies, annuls the contract; this is beyond all doubt.

But it is asked, whether the violation of one article only of the treaty may cause the total rupture of it? Some * here distinguish between the articles connected together (*connexi*) and the separate articles (*diversi*) and pronounce, that though the treaty be violated in the separate articles, the peace subsists with regard to the other. But to me Grotius's opinion seems evidently founded on the nature and spirit of treaties of peace. This great man says, "That all the articles of one and the same treaty are conditionally included in one another, as if it had been formally said: I will do this, provided on your side you do that †." And he justly adds that, "when it is designed that the engagement shall not be rendered ineffectual thereby, this express clause is inserted: That though any one of the articles of a treaty should be broken, the others nevertheless shall subsist in their whole force." Such an agreement may unquestionably be made. It may likewise be agreed, that the violation of one article shall produce only the nullity of those corresponding to it, and which as it were, constitute the equivalent to it. But if this clause be not expressly specified in the treaty of peace, the violation of one single article overthrows the whole treaty, as we have proved above, in speaking of treaties in general (Book II. § 202).

Equally insignificant is the distinction proposed here between the articles of great importance and those of little importance. According to the strict justice the violation of the least article

* Vide Wolf. Jus Gent. § 1022, 1023. † Lib. III. Cap. XIX. § 14.

dispenses

§ 46.
3d. By the violation of some article.

§ 47.
The violation only of one article breaks the whole treaty.

§ 48.
Whether a distinction may be made here among the lesser.

more im-
portant ar-
ticles.

dispenses the offended party from the observation of the other, they being all, as we have just seen, connected reciprocally as to many conditions. Besides, what a source of disputes in a such a distinction! who shall determine the importance of the article violated? However, always to annul a treaty on the least cause of complaint, is by no means agreeable to the mutual duties of nations, to humanity, and to the love of peace, which should always particularly influence their conduct.

§ 40.
Of the pe-
nalty an-
nexed to
the viola-
tion of an
article.

In order to prevent so great an inconveniency, a penalty, should be imposed on the infractor of any article of less importance; and then, on his discharging the penalty, the treaty again subsists in its whole force. Likewise a penalty may be annexed to the violation of every article proportionate to its importance. This matter we have discussed in the article of truces (Book III. § 243).

§ 50.
Of affected
delays.

Affected delays are equivalent to an express denial, and differ from it only in the artifice, with which he who practices them, seeks to conceal his deceit: he adds fraud to perfidy, and actually violates the article which he should fulfil.

§ 51.
Of unfur-
mountable
impedi-
ments.

But if the impediment be real, time must be allowed; for there can be no obligation to an impossibility; and, for the same reason, if any insurmountable obstacle should render the execution of an article not only impracticable for the present, but for ever impossible, he who engaged for it is guilty of no fault; and the other party cannot make his inability a reason for breaking the treaty, but is to accept of an indemnification if the case be of such a nature, and an indemnification be practicable. However, if what ought to be done in virtue of the article in question be of such a nature that the treaty seems only to have been made with a view to some particular thing, not to any equivalent, the impossibility which has happened, questionably annuls the treaty. Thus it is that a treaty of protection becomes void, on an inability of the protector to make good the protection he promised, though it be not from any fault of his that he is become incapable. Thus whatever a sovereign may have promised on condition of procuring for him the restitution of an important place, if this cannot be obtained he is discharged from all he had promised in consideration of having it restored. Such is the invariable rule of the law. But the rigour of the law is not always to be insisted on. Peace is so essential to the welfare of mankind, nations are so strictly obliged to cultivate, procure, and on any interruption to restore it, that when such obstacles happen in the execution of a treaty of peace, we are candidly to close with all reasonable expedients, and rather than break a peace already concluded, and take up arms again, accept of equivalents and indemnifications.

§ 52.
Of infrac-
tions of the
treaty of
peace by
subject.

We have in an express chapter (Book II. Chap. VI.), examined how, and on what occasions, the actions of subjects may be imputed to the sovereign and the nation. This must be determined, in order to determine how the proceedings of subjects may

may break a treaty of peace: this is an effect they cannot produce unless their actions are imputed to the sovereign. He who is injured by foreign subjects does himself justice by his own power, when he meets with the offenders in his territories, or in a free place: for instance, on the open sea; or if he pleases, he requires justice from their sovereign. If the offenders are rebellious subjects there is no room for application to their sovereign; but on seizing them even in a free place, every one does himself justice. In this manner pirates are treated. And to avoid all misunderstanding, it is agreed that every private person committing hostilities without a commission from their sovereign should meet with the same treatment.

The actions of our allies may still less be imputed to us than those of our subjects. The infraction of a treaty of peace by allies, even by those who have been included in it, or who joined in it as principal contracting parties, can therefore produce a rupture of it only with regard to themselves, and not all relatively to an ally, who, on his side, religiously observes his engagements. To him the treaty subsists in its whole force, provided he does not undertake to support the cause of these perfidious allies. If he furnishes them with any succour, which he cannot owe them in an occasion of this nature, he espouses their quarrel, and becomes an accomplice in their breach of faith. But if he is desirous of preventing their ruin, he may interpose, and by obliging them to make proper reparations, save them from an oppression which would recoil on himself. The defence of them becomes just against an implacable enemy who will not sit down with a just satisfaction.

When the treaty of peace is violated by one of the contractors, the other is at liberty to declare the treaty broken, or allow it to subsist; for he cannot be bound by a contract of reciprocal engagement towards him who does not regard the same contract. But if he chuses not to come to a rupture, the treaty remains valid and obligatory. It would be absurd that he who had broke it could pretend that it was annulled by his own perfidiousness: this would indeed be an easy way of shaking off engagements, and reduce all treaties to vain formalities. If the offended party be willing to let the treaty subsist, he may remit the infraction committed, or require an indemnification or a just satisfaction, or discharge himself from such engagements as correspond with the article violated, from what he had promised in consideration of what has not been fulfilled. But if he determines on demanding a just indemnification, and the party in fault refuses it, the treaty is then, of consequence, broke, and the injured contractor has a very just cause for taking up arms again. And this is generally the case, it being seldom seen that the guilty party will so far acknowledge its fault as to condescend to make reparation.

C H A P. V.

Of the Right of Embassy, or of the Right of sending or receiving public Ministers.

§ 55.
It is necessary that nations may treat and communicate together.

IT is necessary that nations should treat with each other for the good of their affairs, for avoiding reciprocal damages, and for adjusting and terminating their differences. And all being under the indispensable obligation of joining and concurring in what tends to the common safety, and the opportunity (Prelim. § 13.) of procuring to themselves the means of accommodating and concluding their differences (Book II. § 323, &c.); and each having a right to every thing its preservation requires (Book I. § 18.) to whatever can contribute to its perfection without injuring others (ibid. § 23.); as likewise to the means necessary to the accomplishment of its duties: it will follow, that every nation has the right of communicating with others, and is under the reciprocal obligation of conforming to this communication, as much as the state of affairs can permit.

§ 56.
This is done by public ministers.

But nations or sovereign states do not treat together immediately; and it is very seldom that their conductors or their sovereigns can personally confer together for discussing their affairs. These interviews would be often impracticable: and exclusive of delays, troubles, expence, and so many other inconveniences, it is rarely, according to the observation of Philip de Comines, that any good effect can be expected from them. The only way for nations and sovereigns to communicate and adjust their interest is by means of mandatories, or delegates, commissioned with their instructions and powers; that is by means of *public ministers*. This term in its utmost extent denotes every person charged with public affairs, but is more particularly understood of a person acting in such capacity at a foreign court.

At present there are several orders of public ministers, and in the sequel we shall speak of them; but whatever difference custom has introduced among them, the essential character is common to them all. I mean that of *minister* or representative of a foreign power, a person charged with its affairs and orders; and this quality is sufficient for the point in question.

§ 57.
Every sovereign state has a right to send and receive public ministers.

Every sovereign state then has a right to send and receive public ministers; they are the necessary instruments in affairs which sovereigns have among themselves, and to that correspondence which they have a right of carrying on. In the first chapter of this work may be seen what we mean by sovereigns and independent states which constitute the great society of nations. These are the powers which belong to the right of embassy, and an equal alliance or treaty of protection does not take away this right,

An unequal alliance nor even the treaty of protection not being incompatible with sovereignty (Book I. § 5, and 6.) these kinds of treaties do not in themselves deprive a state of the right of sending or receiving public ministers. If the inferior ally or the party protected has not expressly renounced the right of entertaining connections and treating with other powers, it necessarily retains that of sending or receiving ministers. The right like is applicable to such vassals and tributaries as are no subjects (Book I. § 7, 8.).

§ 58.
An unequal alliance nor the treaty of protection does not take away this right.

What is more, this right may even belong to princes or communities though not sovereigns. For the rights, the assemblage of which constitutes full sovereignty are not indivisible, and if, by the constitution of the state, by the concession of the sovereign, or by reservations which the subjects have made with him, a prince or community is possessed of any one of the rights usually peculiar to the sovereign alone, this prince or community may exercise it, and avail himself of it in all its effects and all consequences, natural or necessary, unless they have been formally excepted. Though the princes and states of the empire hold of the emperor or empire, yet in many respects are they sovereigns, and as the constitutions of the empire secure the right to them of treating with foreign powers and contracting alliances with them, they incontestably have also that of sending and receiving public ministers. This, when they have been able to carry their claims very high, the emperors sometimes have disputed with them, or insisted that at least the exercise of it should be submitted to their supreme authority; pretending that their permission was necessary. But since the peace of Westphalia, and the imperial capitulation, the princes and states of Germany have found means to maintain themselves in the possession of this right, and they have secured to themselves so many others, that the empire is now considered as a republic of sovereigns.

§ 59.
Of the right of princes and states of the empire in this respect.

It is the same with regard to subject cities, which are acknowledged to be such, and yet have a right of receiving ministers of foreign powers, and of sending deputies to them; because they have a right of treating with them. On this the whole question depends; for who has a right to the end, has a right to the means. It would be absurd to acknowledge a right of negotiating and treating, and to contest the necessary means of doing it. The cities of Switzerland, Neuchâtel, and Bienne, having the right of banner, have thereby the right of treating with foreign powers, though these cities are under the dominion of a prince. For the right of *banner* or of arms comprehends that of granting succours of troops*, provided it be not contrary to the prince's service. If these cities may grant troops, surely they may receive the demand made to them by a foreign prince, and treat of conditions. They may likewise depute some person to

§ 60.
Of cities having the right of receiving foreign ministers.

* See the history of the Helvetic Confederacy, by M. de Watteville.

him for this purpose, or receive his ministers. And as they have at the same time the administration of the police, they can command respect to such foreign ministers as come to them. What we say of the rights of these cities is confirmed by an ancient and constant practice. However eminent and extraordinary such rights are, they will not be thought strange, if it be considered that these very cities were possessed of great privileges, though at the same time their princes themselves held of the emperor, or of other lords, who were immediate vassals of the empire: when they threw off the yoke, and put themselves in a perfect independency, the considerable towns of their territories made their conditions, and instead of rendering their situation worse, it was very natural for them to take advantage of junctures for rendering it still more free and happy. Sovereigns cannot now protest against the conditions on which those towns consented to follow them, and acknowledge them their superiors.

§ 61.
Ministers of
viceroys.

Viceroy and governors in chief of a remote province have frequently a right of sending and receiving public ministers; but they act in the name and by the authority of the sovereign whom they represent, and whose rights they exercise. This entirely depends on the will of their constituent. The viceroys of Naples, the governors of Milan, the governors-general of the Netherlands for Spain, were invested with this power.

§ 62.
Ministers of
the nation
or regents
during an
interreg-
num.

The right of embassy, like all other rights of sovereignty, resides solely in the nation as its principal and primitive subject. In the interregnum, the exercise of this right returns to the nation, or devolves to those whom the laws have invested with the regency of the state. They may send ministers in the same manner as the sovereign used to do, and these ministers have the same right as those of the sovereign had. On the vacancy of the throne, the republic of Poland sends ambassadors, and would not suffer that they should be treated with less regard and consideration than those sent when it has a king. Cromwell effectually maintained the ambassadors of England in the same rank and regard as when they were sent by the authority of kings.

§ 63.
Of him who
disturbs an-
other in the
right of
embassy.

Such being the rights of nations, a sovereign attempting to hinder another from sending and receiving public ministers, does him an injury, and offends against the law of nations. It is attacking a nation in one of its most valuable rights, and opposing what nature herself gives to every independent society; it is breaking the bands by which nations are united, and offending them all.

§ 64.
Of what is
allowable
herein in
time of war.

But this is to be understood only in a time of peace: war introduces other rights. It allows us to cut off from an enemy all his resources, to hinder him from sending ministers to solicit assistance. There are even occasions when the ministers of a neutral nation going to an enemy, may be refused a passage. There is no obligation of suffering them to carry to him perhaps salutary informations, and to concert measures for assisting him.

This admits of no doubt, for instance, in case of a besieged town. No right can authorise the minister of a neutral power, nor any other person whatsoever, to go into it without the besiegers leave; but to prevent offence, good reasons must be given to sovereigns for this refusal of letting their ministers pass, and with such they are to be satisfied, if they are disposed to continue neutral. Passage is even sometimes refused to suspected ministers in critical and dubious junctures, though there be no open war. But this is a delicate proceeding, and if not justified by reasons entirely satisfactory, produces an acrimony which easily produces a rupture.

As nations are obliged to correspond together, attend to the proposals, and demands made them, to maintain a free and safe way of explaining themselves and adjusting the differences; a sovereign cannot, without very particular reasons, refuse admitting and hearing the minister of a friendly power, or of one with whom he is at peace. But in case there are reasons for not admitting him into the heart of the country, he may appoint a place on the frontiers, notifying that he will send proper persons for hearing his proposals, and there the foreign minister is to stop: it is sufficient that he is heard.

§ 65.
The minister of a friendly power to be received.

The obligation does not go so far as to suffer at all times perpetual ministers, who are desirous of residing with a sovereign, though they have nothing to negotiate. It is natural, indeed, and very agreeable to the sentiments which nations owe to each other, that these resident ministers, when there is nothing to be feared from their stay, should be friendly received: but if there be any solid reason against this, what is for the good of the state ought unquestionably to be preferred; and the foreign sovereign cannot take it amiss if his minister, who has concluded the affairs of his commission, and has no other affairs to negotiate, be desired to depart. The custom of keeping every where ministers continually resident, is now so strongly established, that the refusal of a conformity to it would, without very good reasons, give offence. These reasons may arise from particular conjunctures; but there are also common reasons always subsisting, and such as relate to the constitution of a government and state of a nation. The republics have often very good reasons of the latter kind, to excuse themselves from continually suffering foreign ministers, who corrupt the citizens, in order to gain them over to their masters, to the great prejudice of the republic, and fomenting of the parties, &c. And should they only diffuse among a nation, formerly plain, frugal, and virtuous, a taste for luxury, avidity for money, and the manners of courts, these would be more than sufficient for wise and provident rulers to dismiss them. The Polish government is not fond of resident ministers among them, as indeed their practices with the members of the diet have given but too many reasons for keeping them at a distance from it. In the year 1666 a nuncio openly complained before the diet, that the French ambassador pro-

§ 66.
Of resident ministers.

longed

longed his stay in Poland without any necessity, and that he ought to be looked on as a spy: others in 1668, moved for a law to fix the term an ambassador should be allowed to stay in the kingdom *.

§ 67.
How ministers of an enemy are to be admitted.

The greater the calamities of war are, the more it is in it incumbent on nations to preserve means for putting an end to it. This produces a necessity, that even in the midst of hostilities, they may be at liberty reciprocally to send ministers for making overtures of peace, or some proposals for abating the rage of war. The ministers of an enemy cannot indeed come without permission; accordingly a passport or safe-conduct is asked for him, either through the intervention of a common friend, or by one of those messengers whom the laws of war protect, and of whom we shall speak in the sequel; I mean a trumpet or drum. It must likewise be owned, that on solid reasons, the safe-conduct may be refused, and the minister not admitted. But this freedom, which is founded on the care every nation owes to its safety, does not hinder but that it may be laid down as a general maxim, that we are not to refuse admitting and hearing an enemy's minister: that is, that war alone, and of itself, is not a sufficient reason for refusing to hear every proposal coming from an enemy. To warrant such refusal there must be some particular and well-grounded reason; as for instance, a reasonable fear, a fear justified by the very conduct of an insidious enemy, which sends its ministers to make proposals, only with a view of making divisions among allies, of lulling them asleep with appearances of peace, and imposing on them.

§ 68.
Whether ministers may be received from or sent to an usurper.

Before I close this chapter it will be proper to examine a question, famous for being often debated, whether foreign nations may receive ambassadors and other ministers of an usurper, and send such ministers to him. Here foreign powers, if the advantage of their affairs invites them to it, follow possession: there is no rule more certain, or more agreeable to the law of nations and the independency of them. As foreigners have no right to interfere in the domestic concerns of a people, they are not obliged to canvass and inspect its œconomy in those particulars, or to weigh either the justice or injustice of them. They may, if they think proper, suppose the right to be annexed to the possession. When a nation has expelled its sovereign, the other powers which are not willing to declare against it, and would not draw on themselves its arms or enmity, consider that nation as a free and sovereign state, without taking on themselves to determine whether it has acted justly in withdrawing from the allegiance of subjects and dethroning the prince. Cardinal Mazarine received Lockhart, who had been sent as ambassador from the republic of England, and would neither see king Charles the Second nor his ministers. If a nation, after driving out its prince, submits to another, or changes the order of suc-

* Wiquefort's Ambassador, Book I. § 1.

cession,

cession, and acknowledges a sovereign to the prejudice of the natural and appointed heir; foreign powers may here likewise consider what has been done as legal; it is no quarrel or business of theirs. At the beginning of the last century, Charles duke of Sudermania having obtained the crown of Sweden, to the prejudice of Sigismund king of Poland, his nephew, was soon acknowledged by most sovereigns. *Villeroy*, minister of Henry the IVth, king of France, at that court, in a memoir of the 8th of April 1608, plainly said to the president Jeannin, *All these reasons and considerations shall not hinder the king from treating with Charles, if he finds it to be his interest, and that of his kingdom.*

This was arguing sensibly. The king of France was neither the judge nor the guardian of the Swedish nation, that he should, against the good of his own kingdom, refuse to acknowledge the king which Sweden had chosen, under pretence that a competitor termed Charles an usurper. Had it even been done with justice, it does not come under the cognizance of foreigners.

Therefore, when foreign powers have received the ministers of an usurper, and sent theirs to him, the lawful prince; on recovering his throne, cannot complain of these measures as an injury, nor justly make them the cause of a war, provided these powers have not gone farther, nor furnished any succours against him. But to acknowledge the prince dethroned; or his heir, after a solemn acknowledgment of him who fills his place, is doing wrong to the latter, and declaring against the nation who has chosen him. Such a step which had been taken in favour of James the second son, king William the Third, and the English nation, alledged as one of the principal reasons of the war which England soon after declared against France. All the blandishments, and all the protestations of Lewis XIV. were of no weight: the English accounted the acknowledgment of James's son as king of England, Scotland, and Ireland, by the title of James the Third; an outrage and injustice both to the king and the nation.

C H A P. VI.

Of the several Orders of public Ministers, of the representative Character, and of the Honours due to Ministers.

ANTIENTLY, scarce any other than one order of public ministers was heard of; these were in Latin termed *Legati*, which has been rendered by the word ambassador; but courts becoming more proud, and consequently more difficult on the ceremonial part especially, it was thought necessary to extend the representation of the minister to the dignity of his master; and for avoiding difficulties, perplexities, and expence, commissioners

§ 69.
Origin of
the several
orders of
public mi-
nisters.

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of a less exalted rank came to be employed on certain occasions (perhaps of this the first example was set by Lewis the XIth, king of France.) Thus several orders of ministers being established, more or less dignity was annexed to their character, and proportionate honours were required for them.

§ 70.
Of the representative character.

Every minister in some measure represents his master, as every attorney or mandatory represents his constituent. But this representation relates to the affairs of his office; the minister represents the subject in whom reside the rights which he is to exercise, preserve, and assert, the rights which he is to treat of in the master's stead. In the generality, and for the essential part of affairs, such representation is admitted as an abstract from the dignity of the constituent. Afterwards sovereigns would be represented not only in their rights, and to settle their affairs, but likewise in their dignity, their grandeur, and pre-eminence: unquestionably this custom was derived from some signal occasions, and ceremonies, as marriages, for which ambassadors are sent. But such sublime degree of dignity in the minister is very inconvenient to business, often occasioning difficulties and contests. This has introduced the several ranks of public ministers, and the different degrees of representation. Custom has established three principal degrees. *The representative character*, so called by way of excellence, is the power resident in the minister of representing his master, even in his very person and dignity.

§ 71.
Of ambassadors.

The representative character, so termed by way of excellence, or in distinction from other kinds of representations, constitutes the minister of the first rank, the ambassador. It places him above all other ministers who are not invested with the same character, and precludes their entering into competition with the ambassador. At present there are ambassadors ordinary and extraordinary; but this is no more than an accidental distinction, and relative to the subject of their mission. Yet almost every where some difference is made in the treatment of these different ambassadors. This is merely matter of custom.

§ 72.
Of envoys.

Envoys are not invested with the representative character, properly so called, or in the first degree. They are ministers of the second rank, on whom their master was willing to confer a degree of dignity and regard, which, without being on a level with the character of an ambassador, immediately follows it, as superior to every other. There are also *envoys ordinary and extraordinary*; and the intention of princes manifestly is, that the latter be most regarded. This likewise depends on custom.

§ 73.
Of residence

The word *resident* formerly related only to the continuance of the minister's stay, and it is frequent in history for ambassadors in ordinary to be styled only residents. But since the establishment of different orders of ministers, the name of resident has been limited to ministers of a third order, to the character of which general practice has annexed a lesser degree of regard. The resident does not represent the prince's person in his dignity, but only in his affairs. His representation is in reality of the same

nature as that of the envoy: and he is accordingly, together with the envoy, often termed a minister of the second order; and the public ministers are distinguished only into two classes; ambassadors who have the representative character, so termed by way of excellence, and all the ministers who are not invested with that eminent character. This is the most necessary distinction, and indeed the only essential.

Lastly, a custom still more modern, has erected a new kind of ministers, without any particular determination of character. § 74.
Of ministers These are called simply ministers, to indicate that they are invested with the general quality of a sovereign's mandatories, without any particular assignments of rank and character. It was likewise the punctilio of ceremony which gave rise to this novelty. We had established distinct treatment for an ambassador, an envoy, and a resident. Difficulties betwixt ministers of the several princes often arose on this head, and especially about rank. In order to avoid all contest on certain critical occasions, when they might be apprehended, it has been judged proper to send ministers, without giving them any of their known characters; such are not subjected to any settled ceremony, and can pretend to no particular treatment. The minister represents his master in a vague and indeterminate manner, which cannot be equal to the first degree, and consequently makes no difficulty of yielding to an ambassador. He is intitled to the general regard due to a person of confidence, to whom the sovereign commits the care of his affairs, and he has all the rights essential to the character of a public minister. This indeterminate quality is such, that the sovereign may give it to one of his servants on whom he would not confer the character of ambassador: and, on the other hand, it may be accepted by a man of rank, who would not submit to the rank of resident, and acquiesce in the treatment at present allotted to that station. There are also *ministers plenipotentiaries*, and of much greater distinction than simple ministers. These neither have any particular attribution of rank and character, but by custom are now placed immediately after the ambassador, or on a level with the envoy extraordinary.

We have spoken of *consuls* in the article of commerce (Book § 75.
Of consuls; II. §. 34.). Formerly *agents* were a kind of public ministers; agents, deputies, &c. but in the present increase and profusion of titles, this is given to mere commissioners, appointed by princes for their private affairs, and who not unfrequently are subjects of the country where they reside. They are not public ministers, and consequently not under the protection of the law of nations. But a more particular protection is due to them than to other foreigners or citizens, and some regard in consideration of the prince whom they serve. If this prince sends an agent with credentials, and for public affairs, the agent from that time becomes a public minister: the title makes no alteration. This is likewise applicable

to deputies, commissaries, and others charged with public affairs.

§ 76.
Of creden-
tials.

Among the several characters established by custom, it is in the sovereign's choice with which he will invest his minister; and the character of the minister is made known in the credentials which he delivers to the sovereign to whom he is sent. Letters of credence are the instruments which authorises and establishes the minister in his character with the prince to whom they are addressed. If this prince receives the minister, he can receive him only in the quality attributed to him in his credentials. They are as it were his general letter of attorney, his *mandate patent*, *mandatum manifestum*.

§ 77.
Of instruc-
tions.

The instructions given to the minister contain the master's *secret mandate*; the orders to which the minister must carefully conform, and which limit his powers. Here might be applied all the rules of the law of nature concerning the subject of the mandate, whether patent or secret. But as this more particularly concerns the subject of treaties, we may the more properly exclude such details from this work, as by a very well-grounded custom any engagements which the minister should enter into, are at present of no force among foreigners, unless ratified by his principal.

§ 78.
Of the
right of
sending am-
bassadors.

We have seen above, that every sovereign, and even every body-politic, or every person who has a right to treat with foreign powers, may also send ambassadors. See the foregoing chapter. As to simple ministers or mandatories, considered in general as charged with affairs, and furnished with powers from those who have a right of treating, this admits of no difficulty. The rights and prerogatives of ministers of the second order are still granted to ministers of any sovereign state; potent monarchs indeed deny some petty states the right of sending ambassadors; but let us see with what reason. According to the usage generally received, the ambassador is a public minister representing the person and dignity of a sovereign; and this representative character procures him particular honours. Great princes make a difficulty of admitting an ambassador of a small state, from a repugnancy of paying him such distinguished honours. But it is manifest that every sovereign has an equal right of causing himself to be represented, no less in the first, than in the second or third degree. Besides, in the society of nations, a distinguished consideration is due to the sovereign dignity. We have shewn (Book II. Ch. III.) that the dignity of independent nations is essentially the same; that a sovereign prince, though weak, is a sovereign independent, and equal to the greatest monarch, as a dwarf is not less a man than a giant, though indeed the political giant makes a greater figure in the general society than the dwarf, and on this account more respect and signal honours are paid to him. It is evident then that every prince and every state has a right of sending ambassadors, and that to oppose it in such right is a very great injury; it is contesting its sovereign dignity. And if
it

it has this right, its ambassadors cannot be denied those regards and honours which custom particularly assigns to the representative of a sovereign. The king of France receives no ambassadors from the princes of Germany, as refusing to their ministers the honours annexed to the first degree of representation; yet he admits ambassadors from the princes of Italy. The reason pretended for this is, that the latter are more perfectly sovereigns than the former, as not holding in a like manner from the authority of the emperor or the empire, though feudatories of it. Yet the emperors claim the same rights over the princes of Italy, as over those of Germany. But France, seeing that the former do not make one body with Germany, nor assist at the diets, countenances their absolute independence, in order as much as possible to detach them from the empire.

I shall not here enter into a detail of the honours due and actually paid to ambassadors; these depend merely on institution and custom: I shall only observe, in general, that they are intitled to those civilities and distinctions which use and good manners have appointed, as expressions of the consideration suitable to the representative of a sovereign. And it must be observed here, with regard to things of institution and custom, that when a practice is so settled as to give a real value to things indifferent in their nature, and a fixed signification according to the manners and usages, the natural and necessary law of nations necessarily requires that regard should be had to such institution, and to behave in such things as if they had in themselves the value which has been annexed to them. For instance, according to the usage throughout Europe, it is a peculiar right for the ambassador to wear his hat before the prince to whom he is sent. This right expresses that he is acknowledged the representative of a sovereign; to refuse it therefore to the ambassador of a state truly independent, would be an injury to the state, and in some measure degrading it. The Switzers, who formerly understood war better than the usages or forms of courts, and little mindful of what was mere ceremony, having on some occasions permitted themselves to be treated in a manner little suitable to the dignity of the nation, their ambassadors, in 1663, suffered the king of France, and the nobles of his court, to refuse them those honours which custom has rendered essential to the ambassadors of sovereigns, and particularly that of being covered before the king at their audience.

Some who knew better what they owed to the glory of their republic, strongly insisted on this essential and distinctive honour; but it was carried by a majority, and, at length, all yielded, on being assured that the ambassador of the nation had not covered themselves before Henry the IVth. Allowing the fact to be true, the reason was not unanswerable. The Switzers might reply, that in Henry's time their nation was solemnly acknowledged free and independent of the empire, as in 1648, by the treaty of Westphalia. They might have said, that though their

predecessors had been wanting in a proper support of the dignity of their sovereigns, that gross oversight was no obligation on their successors to commit the like. At present, as the nation knows better, and is more attentive to those kind of things, it will not fail to maintain its dignity. Any other extraordinary honours paid to its ambassadors will not be able to blind it so far as to overlook that which custom has rendered essential. When Lewis XV. came into Alsatia in 1744, the Helvetic body declined sending ambassadors to compliment him, according to custom, without knowing whether their ambassadors would be allowed to wear their hats: and on the refusal of this just demand, none were sent. Switzerland may reasonably hope that his most Christian majesty will no longer insist on a claim which does not heighten the lustre of his crown, but degrades ancient and faithful allies.

C H A P. VII.

Of the Rights, Privileges, and Immunities of Ambassadors, and other Public Ministers.

§ 80.
Respect due
the public
ministers.

A RESPECT due to sovereigns should reflect on their representatives, and chiefly on their ambassadors, as representing his master's person in the first degree. Whoever affronts or injures a public minister commits a crime the more deserving a severe punishment, as thereby the sovereign and his country might be brought into great difficulties and trouble. It is just that he should be punished for his fault, and that the state should, at the expence of the delinquent, give a full satisfaction to the sovereign affronted in the person of his minister. If a sovereign minister offends a citizen, the latter may oppose him without departing from the respect due to the character, and give him a lesson which shall both efface the stain of the outrage and expose the author of it. The person offended may further prefer a complaint to his sovereign, who will demand of the minister's master a just satisfaction. The great concerns of the state forbid a citizen, on such occasions, to entertain those thoughts of revenge which the point of honour might suggest, though otherwise allowable. Even, according to the maxims of the world, a gentleman receives no disgrace by an affront for which it is not in his power, of himself, to procure satisfaction.

§ 81.
Their person
sacred
and invio-
lable.

The necessity and right of embassies being established (See Chap. V. of this Book), the perfect security, the inviolability of ambassadors, and other ministers, is a certain consequence of it; for if their person be not defended from violence of every kind, the right of embassies becomes precarious, and the success very uncertain. A right to the end is a right to the necessary means. Embassies then being of such great importance in the universal society of nations, and so necessary to their common well-being,

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the person of ministers charged with this embassy is to be *sacred* and *inviolable* among all nations (See Book II. §. 218.). Whoever offers any violence to an ambassador, or any other public minister, not only injures the sovereign whom this minister represents, but he also hurts the common safety and well-being of nations: he becomes guilty of an atrocious crime towards the whole world.

This safety is particularly due to the minister, from the sovereign to whom he is sent. To admit a minister to acknowledge him in such quality, is engaging to grant him the most particular protection, and that he shall enjoy all possible safety. A sovereign is indeed to protect every person within his dominions, whether native or foreigner, and shelter him from violence; but this attention is in a higher degree due to a foreign minister. A violence done to a private person is a common trespass, which, according to circumstances, the prince may pardon: but if done to a public minister, it is a crime of state, an offence against the law of nations. A pardon of this does not depend on the prince in whose country the crime has been committed, but on him who has been offended in the person of his representative. However, if the minister has been insulted by persons ignorant of his character, the fault does not affect the law of nations; but comes within the case of common trespasses. Some dissolute young fellows in a town of Switzerland having, in the night-time, insulted the English minister's house, not knowing who lived there, the magistracy sent a message to the minister to know what satisfaction he required. He wisely answered, that it was the magistrates concern to vindicate the public as they should judge proper; but as for himself he required nothing, not thinking himself affronted by persons who could have no design on him, as not knowing his house. Another particular circumstance in the protection of foreign ministers is this: According to the wretched maxims introduced by a false point of honour, a sovereign is under a necessity of shewing indulgence towards a person wearing a sword, who instantly revenges an affront done to him by a private person; but violent proceedings can never be allowed of, or excused against a public minister, unless the latter, by beginning and urging the violence, should lay the other under a necessity of defending himself.

Though the minister's character does not become declared in its whole extent, and thus does not secure to him the enjoyment of all his rights till he is acknowledged and admitted by the sovereign to whom he delivers his credentials; yet, on his entering into the country whither he is sent, and making himself known, he is under the protection of the law of nations; otherwise it would not be safe for him to come. Till he has had his audience of the prince, he is on his word to be considered as a minister; and further, besides notice of it, usually sent by letters in case of doubt, the minister is provided with passports, certifying his character.

§ 82.
Particular
protection
due to them

§ 83.
Of the
time when
it com-
mences.

§ 84.
What is
due to
them in
countries
through
which they
pass.

These passports sometimes become necessary to him in the countries through which he passes in his way to the place of his destination; and, when it is necessary for procuring the respect and honour due to him, he produces them. Indeed that prince alone to whom the minister is sent, is under a particular obligation that he shall enjoy all the rights annexed to his character: yet the others, through whose dominions he passes, are not to deny him those regards to which the minister of a sovereign is intitled, and which nations reciprocally owe to each other. They especially owe him an entire safety. To insult him would be injuring his master and the whole nation; to arrest him and offer violence to him, would be hurting the right of embassy, which belongs to all sovereigns (§ 57, 63.). Francis the First king of France, had all the reason in the world to complain of the murder of his ambassadors Rincon and Fregosa, as an horrible crime against public faith and the law of nations. These two persons, destined the one to Constantinople, and the other to Venice, having embarked on the Po, were stopt and murdered, and in appearance by order of the governor of Milan *. The emperor Charles the Vth's negligence to discover the author of the murder gave room to think that he had ordered it, or at least that he had tacitly approved of the fact. And as he did not give any suitable satisfaction concerning it, Francis the First had a very just cause for declaring war against him, and even demanding assistance of all other nations. For an affair of this nature is not a particular difference, or a litigious question, in which each party wrests law over to its side; it is the quarrel of all nations who are concerned to maintain as sacred the right and means of communicating together, and treating of their affairs. If an innocent passage be due, even with entire safety, to a mere private person, much more is it due to the minister of a sovereign who is going to execute his master's orders, and travels on the affairs of a nation. I say, an innocent passage; for the minister's journey is justly suspected, if a sovereign has reason to apprehend that he will abuse the freedom of coming into his country, for plotting something against his service, or that he is going to give intelligence to his enemies, or to stir up others against him. We have already said (§ 64.) that a passage may be denied him; but he is not to maltreat him, nor suffer any insult to be offered to his person. Though he has not reason sufficient for denying him a passage, he may take precautions against the ample use which the minister may make of it. These maxims the Spaniards found even in Mexico, and the neighbouring countries. The ambassadors were respected all along the road; but if they went out of the highway they were to forfeit their rights †. A very wise reservation, that spies might not be sent under the name of ambassadors. Thus, at the famous con-

* *Memoirs of Martin du Bellay, Book IX.*

† *Sola's History of the Conquest of Mexico.*

gress of Westphalia, whilst peace was negotiating amidst the dangers of war and the noise of arms, the routs of the several couriers sent or received by the plenipotentiaries were marked, and out of such limits their passports were of no protection*.

What we have said concerns nations which are at peace with each other. On the breaking out of a war, the obligation of leaving the enemy in the free enjoyment of his right ceases; and, on the other hand, we are warranted in depriving him, weakening him, and reducing him to accept of equitable conditions. His men may also be attacked and seized wherever there is a right of exercising acts of hostility. Thus a passage may not only be refused to the ministers of an enemy sent to other sovereigns, but if they undertake to pass privately, and without permission, into places belonging to their master's enemy, they are liable to be arrested; and of this the last war furnishes a signal instance. An ambassador of France going to Berlin, by the imprudence of his guides, took his way through a village within the electorate of Hanover, of which the sovereign, the king of England, was at war with France; he was arrested, and afterwards sent over to England. As his Britannic majesty had herein only made use of the rights of war, neither the court of France nor that of Prussia complained about it.

The reasons which render embassies necessary, and ambassadors sacred and inviolable, are of no less force in time of war than in a profound peace. On the contrary, the necessity and indispensable duty of retaining some method of reconciliation and the restoration of peace, is a fresh reason why the persons of ministers, as instruments of the reconciliatory conferences, should be still more sacred and inviolable. *Nomen legati, says Cicero, ejusmodi esse debet, quod non modo inter sociorum jura, sed etiam inter hostium tela incolumis versetur*†. Accordingly, the safety of persons bringing messages or proposals from the enemy, is one of the most sacred laws of war. Indeed the ambassador of an enemy is not to come without permission; and as there is not always the conveniency of procuring it by neutral persons, this has been supplied by the establishment of certain privileged messengers for carrying proposals from enemy to enemy, in perfect safety.

I mean heralds, trumpeters, and drummers, who by the laws of war, and those of nations, are, on their making themselves known, and keeping within the terms of their commission, and the functions of their employment, are sacred and inviolable. This must necessarily be; for exclusive of what we have said concerning the reservation for restoring peace, there are, in the very course of war, a thousand occasions, when the common safety and the advantage of both parties require that they should be able to send messages and proposals. Heralds succeeded the *feciales* of the Romans: at present they are grown out of use;

§ 85.
Ambassadors going into an enemy's country.

§ 86.
Embassies betwixt enemies.

§ 87.
Of heralds, trumpeters, and drummers.

* Wicquefort's Ambassador, Book I. §. 17.

† In Verrem; Lib. I.

drummers

drummers or trumpeters are sent, and afterwards, according to the occasions, ministers or officers furnished with powers. These drummers and trumpeters are sacred and inviolable, but they are to make themselves known by the marks peculiar to them. Maurice prince of Orange highly reitented the garrison of Ysendick firing on his trumpeter*, saying, that they who violate the law of nations cannot be too severely punished. Other instances may be seen in Wicquefort, and particularly the reparation which the duke of Savoy, as general of Charles the Vth's army, caused to be made to a French trumpeter, who had been pulled off his horse and stripped by some German soldiers †.

§ 88.
Ministers,
trumpeters,
&c. to be
respected
even in a
civil war.

In the wars of the Netherlands the duke of Alva hanged up a trumpeter belonging to the prince of Orange, saying, that he was not obliged to allow safety to a trumpeter sent him by the chief of the rebels ‡. Certainly this sanguinary general, on this occasion, as on many others, violated the laws of war, which, as we have proved above (Book III. Chap. XVIII.), are to be observed even in civil wars. And unless both parties can, with the greatest safety, interchange messages, and reciprocally send persons of confidence, how, on these unfortunate occasions, will they ever come to talk of peace? what way is left for negotiating a salutary accommodation? The same duke of Alva, in the war which the Spaniards afterwards made on the Portuguese, whom they also termed rebels, caused the governor of Cascais to be hanged, for firing on a trumpeter sent to summon the place §. In a civil war, or when a prince takes arms for subduing a people which believes itself discharged from their obedience to him, to pretend that the enemies should respect the laws of war, whilst he himself treats them in a quite contrary manner, is carrying wars to the most cruel extremes, and forming a series of mutual reprisals; it is turning them into massacres without rule or measure.

§ 89.
Sometimes
they may
be denied
admittance.

But as a prince may, on good reasons, dispense with himself from hearing and admitting ambassadors, the general of an army, or any other commander, is not always obliged to receive a trumpeter or drummer: for instance, if the governor of a place apprehends that a summons may intimidate his garrison, and raise thoughts of capitulating sooner than is proper, he may unquestionably send notice to a trumpeter who is coming up, that he should withdraw; and likewise declare, that if he returns on the same cause, and without leave, he shall be fired on. This conduct is not a violation of the laws of war, but is to be practised only for very cogent reasons; as it irritates the enemy, and exposes us to be treated by them with the greatest rigour. To refuse hearing a trumpet without alledging a good reason, is declaring a determined intention of carrying on the war to the utmost extremity.

* Wicquefort, Book I. §. III.
‡ Idem ibid.

† Ibid.

‡ Idem ibid.

Whether a herald or a trumpeter be admitted or rejected, any thing which may be construed an insult is to be avoided towards him. This is a respect not only due to the law of nations, but likewise a prudential maxim. In 1744, the Bailly de Givry sent a trumpeter with an officer to summon the redoubt of Pierrelongue, in Piedmont. The Savoyard officer who commanded in the redoubt, a brave man, but rough and hot, affronted at being summoned in a post which he thought tenable and secure, returned an answer reflecting on the French general. The officer, like a man of sense, delivered it to the Bailly de Givry in the presence of the French troops. It set them in a flame, and their natural courage being stimulated by the ardour of revenging an affront, they were not to be stopped; the attack proved very bloody; but their losses animated them the more, till at length they carried the redoubt: and thus the imprudent commandant was accessory to his own death, the slaughter of his men, and the loss of his post.

§ 90.
Every thing which has the appearance of insult must be avoided.

The prince, the general of the army, and every commander in chief within his department, have alone the right of sending a trumpeter or drummer; and it is only to the commander in chief that such messengers can be sent. Should a general, besieging a town, take upon him to send a trumpeter to any subaltern, to the magistracy, or the townsmen, the governor might justly treat this trumpeter as a spy. Francis 1st, king of France, during the war with Charles the Vth, sent a trumpeter to the diet of the empire, then assembled at Spire. The trumpeter was seized by order of the emperor, who threatened to hang him because he was not sent to him*. But this was more than he dared, knowing very well, notwithstanding all his clamors, that the diet having a right, even without his consent, to hear an enemy's overtures, that enemy might send a trumpet to it. On the other hand, a drummer or trumpeter from a subaltern is seldom received, unless for some particular end, depending on the present authority of this subaltern acting in his function. At the siege of Rhymberg, in 1598, a colonel of a Spanish regiment having forgot himself so far as to cause the place to be summoned, the governor sent word to the drummer to withdraw, and that should any other drummer or trumpeter come again from a subaltern, a halter should be his portion†.

§ 91.
By and to whom they may be sent.

The inviolability of a public minister, or the safety due to him, more sacredly and more particularly than to any other person, whether foreigner or native, is not his only privilege; he is further, by the universal practice of nations, to enjoy an entire independency from the jurisdiction and authority of the state where he resides. Some authors‡ pretend that this independency is merely positive among nations, and will have it referred to the arbitrary law of nations, which owes its origin to the manners, the customs, or particular conventions: they deny it to be grounded

§ 92.
Independence of foreign ministers.

* Wicquefort, ubi supra.

† Idem ibid.

‡ Vide Wolf. Jus Gent. § 1039. on

on the natural law of nations. Indeed the law of nature gives men a right of punishing those who do them wrong, and consequently impowers a sovereign to punish a foreigner who disturbs the public tranquillity, offends themselves, or maltreats their subjects: it authorises them to compel this foreigner to conform himself to the laws, and to behave properly towards the citizens. But it is no less true, that the same natural law imposes on all sovereigns the obligation of consenting to those things without which nations could not cultivate the society nature has established among them, correspond together, negotiate their affairs, or adjust their differences. Now, ambassadors and other public ministers are instruments necessary to the support of this general society, of this mutual correspondence of nations. But their ministry cannot attain its designed end, unless invested with all the prerogatives which may secure the lawful success of it, and which are necessary for the free, faithful, and safe discharge of it. The same law of nations whereby they are obliged to admit foreign ministers, manifestly obliges them likewise to admit those ministers, with all the rights necessary to them, and all the privileges relative to the exercise of their functions. It is easy to conceive that independency must be one of these privileges; without it, that privilege so necessary to a public minister would be precarious and fluctuating. He might be molested, injured, maltreated, under a thousand pretences. A minister is often charged with a commission disagreeable to the prince to whom he is sent. If this prince has any power over him, and especially if his authority be sovereign, how is it to be expected that the minister can execute his master's orders with a proper freedom of mind, fidelity, and firmness? It is necessary he should have no snares to fear, that he cannot be diverted from his functions by any chicanery. He must have nothing to hope, and nothing to fear, from the sovereign to whom he is sent. Therefore, in order to the success of his ministry, he must be independent of the sovereign's authority, and of the jurisdiction of the country, both civil and criminal. To this it may be added, that the nobility, and persons of great eminence, will be averse from taking on themselves an embassy, if by this commission they were to be subjected to a foreign authority, and often among nations of no very friendly dispositions to that which they represent; where they must support disagreeable claims, and enter into discussions naturally productive of acrimony. In fine, if an ambassador could be indicted for common trespasses, be criminally prosecuted, taken into custody, punished; if he might be sued in civil cases, the consequence will often be, that he will want the power, leisure, or freedom of mind, which his master's affairs require. How will the dignity of the representation be supported in such a subjection? From all these reasons, it is impossible to conceive, that the prince, in sending an ambassador, or any other minister, intends to submit him to the authority of a foreign power. This is a fresh reason, which fixes the independency of a public minister;

ster. If it cannot be reasonably presumed that his master means to submit him to the authority of the sovereign, to whom he is sent, this sovereign, in receiving the minister, consents to admit him on the footing of independency. And thus there subsists betwixt the two princes a passive convention, giving a new force to the natural obligation.

Practice is entirely consentaneous to our principles. All sovereigns claim a perfect independency for their ambassadors and ministers. If it be true that there was a king of Spain, who, from a desire of arrogating to himself a jurisdiction over the foreign ministers resident at his court, signified to all christian princes, that if their ambassadors should commit any crime in the place of their residence, it was his pleasure that they should forfeit all their privileges, and be tried according to the laws of the country*: one example is of no weight in such a point, and the crown of Spain has not thought fit to adopt that way of thinking.

This independency of the foreign minister is not to be converted into licentiousness; it does not excuse him from conforming, in external actions, in every thing foreign from the end of his character to the customs and laws of the country: he is independent; but he has not a right of doing whatever he pleases. Thus, for instance, if it be generally prohibited to drive a coach near a powder magazine, or over a bridge, to walk among the fortifications of the place, and view them, &c. these prohibitions an ambassador is to regard: should he forget his duty, should he grow insolent, and commit irregularities and crimes, there are several ways of restraining him, according to the nature and importance of his offences; and these we shall speak of, after a few words on the behaviour of a public minister in the place of his residence. He is not to avail himself of his independency for violating the laws and customs; he should rather punctually conform to them, as far as may concern him, though the magistrate has no compulsive power over him; and he is especially obliged religiously to observe the rules of justice towards all who have any dealings with him. As to the prince to whom he is sent, the ambassador should remember, that his ministry is a ministry of peace, and that on this footing only he is received. This reason interdicts every evil practice to him. Let him serve his master, without injuring the prince who receives him. To abuse a sacred character, by securely plotting the ruin of those who respect his character, by laying snares for them, by clandestinely injuring them, by perplexing and ruining their affairs, is a base treachery. What would be infamous and abominable in a private guest, shall that be allowable and becoming in the representative of a sovereign?

§ 91.
How the
foreign mi-
nister is
to behave.

* This is advanced by Anthony de Vera, in his *Complete Ambassador*; but Wicquefort suspects the truth of it, not having, as he says, met with it in any other writer.

Here arises an interesting question : it is but too common for ambassadors to practise on the fidelity of the ministers of the court to which they are sent, and on the secretaries and others employed in offices. What is to be thought of this practice ? To corrupt a person, or to seduce a person by the powerful allurements of gold, to betray his prince, and violate his duty, is uncontestedly, according to all the principles of morality, an evil action. How comes it then that so little scruple is made of it in public affairs ? A wise and virtuous politician * sufficiently gives us to understand that he absolutely disapproves of this scandalous resource ; but, *to avoid being stoned in the political world*, he goes no further than to say, he advises not to make use of it but in the total want of every other resource. But for my part, as I write on the sacred and invariable principles of right, I must, in duty to the moral world, openly aver, that corruption is a method contrary to all the rules of virtue and probity, and that it evidently offends against the law of nature. Nothing can be conceived more flagitious, more opposite to the mutual duties of men, than inducing any one to do evil. The corrupter certainly is guilty towards the wretch whom he seduces ; and as to the sovereign whose secrets are thus betrayed, is it not offending and wronging him to make use of the free access allowed to a foreign minister at his court, for corrupting the fidelity of his servants ? He may order the corrupter to depart, and demand justice of his constituent.

If ever bribery be excusable, it is when it happens to be the only way for coming at a discovery of, and defeating a heinous plot, capable of ruining the state which we serve, or of bringing it into great danger. In betraying such a secret there may, according to circumstances, be little guilt. The great and lawful advantage accruing from the action, drawn from the urgent necessity of having recourse to it, may excuse us from too scrupulous an attention to what may be exceptionable in it on the part of the person bribed. To gain him is no more than an act of simple and just defence. Every day, in order to baffle the machinations of the wicked, men are under a necessity of practising on the vicious dispositions of others. On this footing it is that Henry the IVth said to the Spanish ambassador, *That an ambassador may bribe, to detect the intrigues carrying on against his master's service* ; adding, that the cases of Marseilles, of Metz, and several others, sufficiently shewed that he might very well endeavour to dive into the designs forming at Brussels against the tranquillity of his kingdom. That great prince unquestionably did not think that bribery was always excusable in a foreign minister ; he himself having ordered Bruneau, secretary to the Spanish ambassador, to be taken into custody for having tampered with Mairargues, that Marseilles might be delivered up to the Spaniards.

* M. Pecquet, Discours sur l'Art de Negocier, p. 91, 92.

Barely to make use of a traitor's offers, without any previous seducement, is less contrary to justice and probity. But the abovementioned example of the Romans (Book III. § 155, 181.) which related to declared enemies; these instances, I say, shew that a great soul rejects even this method, disdaining to encourage venality and treachery. A prince or a minister, with sentiments not inferior in generosity to those ancient Romans, will never close with the offers of a traitor, unless obliged to it by a severe necessity; and then not without a sensible concern, that he must owe his safety to such an unbecoming expedient. But I do not here mean to condemn the polite methods, nor even presents or promises which an ambassador employs for procuring friends to his master. To conciliate affections is not corrupting and alluring into guilt; and it is the concern of these new friends, that their inclination for a foreign prince may never warp them from the fidelity which they owe to their sovereign.

Should an ambassador forget the duties of his state, should he render himself disagreeable and dangerous, form cabals and enterprises pernicious to the tranquillity of the citizens, the state, or prince to whom he is sent, there are several ways of correcting him, proportionate to the nature and degree of his fault. If he maltreats the subjects of the state, if he commits any acts of injustice or violence towards them, the subjects injured are not to seek redress from the common magistracy, the ambassador being independent of their jurisdiction; consequently those magistrates cannot proceed directly against him. On such occasions the sovereign is to be applied to; he demands justice from the ambassador's master, and, in case of a refusal, may order the insolent minister to quit his dominions.

§ 94.
How he
may be cor-
rected,
first, with
regard to
common
faults.

Should a foreign minister offend the prince himself, be wanting in respect to him, and by his intrigues raise disturbances in the state and court, the injured prince, from a particular regard to the minister's master, sometimes requires that he should be recalled; or, if the fault be more heinous, the prince forbids him the court, till he receives an answer from his master; but in important cases he proceeds so far as to order him to quit his dominions.

§ 95.
2d. For
faults com-
mitted
against the
prince.

Every sovereign has an unquestionable right to proceed in this manner; for being master in his own dominions, no foreigner can stay at his court, or in his dominions, without his permission. And though sovereigns are generally obliged to hear the overtures of foreign powers, and to admit their ministers, this obligation ceases entirely with regard to a minister, who being himself wanting in the duties incumbent on him from his character, becomes dangerous, or justly suspected by him, to whom he is to come only as a minister of peace. Can a prince be obliged to allow that a secret enemy, who disturbs the state, and is plotting the subversion of it, shall remain in his dominions, and appear at his court? It was a ridiculous answer of Philip II. to queen Elizabeth, who had desired him to recall his ambassador, as having detected him in carrying on dangerous practices. The king

§ 96.
Right of
ordering
away an
ambassador
who is
guilty, or
justly sus-
pected.

of

of Spain would not recall him; saying, "That the condition of princes would be very unhappy, were they obliged to recall their ministers whenever his conduct did not suit the humour and interest of those with whom he was negotiating." Much more unhappy would the condition of princes be, were they obliged to suffer in their states, and at their court, a minister who was disagreeable, or justly suspected, an incendiary, an enemy disguised under the character of an ambassador, who would avail himself of such inviolability, boldly to form pernicious enterprises. The queen, justly offended at Philip's denial, put a guard on the ambassador*.

§ 97.
Right of
checking
him by
force, if he
behaves as
an enemy.

But is an ambassador, whatever enormities he gives himself up to, only to be ordered out of the country? This some authors affirm, grounding their opinion on the perfect independency of a public minister. I own he is independent of the jurisdiction of the country; and I have already said, that, on this account, the common magistrate cannot proceed against him. I further admit, that for all kinds of common faults, for affronts and disorders whereby the citizens and societies are injured, but without affecting the state or the sovereign, this regard is due to a character so necessary for the correspondence of nations, and to the dignity of the prince represented, that the conduct of his minister should be complained of to him, and reparation demanded; and if nothing can be obtained, and the importance of his faults absolutely requires that a stop may be put to them, not to carry resentment beyond an abrupt dismissal. But shall an ambassador with impunity cabal against the state where he resides, plot its ruin, stir up the subjects to revolt, and confidently foment the most dangerous conspiracies, under the assurance of being supported by his master? If he behaves as an enemy, shall it not be allowable to treat him as such? The case is unquestionable with regard to an ambassador who takes arms and uses violence; for they whom he attacks may repel him, self-defence being a part of the law of nature. Those Roman ambassadors who being sent to the Gauls, fought against them with the people of Clusium, divested themselves of their character. Is it to be thought that in battle the Gauls were to spare them †?

§ 98.
Of an am-
bassador
forming
dangerous
plots and
and con-
spiracies.

The question is more difficult with regard to an ambassador, who, without proceeding to open acts, sets on foot dangerous practices, and by his intrigues incites subjects to revolt, forms and encourages conspiracies against the sovereign or against the state. May not a traitor, who abuses his character, and first violates the laws of nations, be checked and exemplarily punished? that sacred law provides no less for the safety of the prince receiving an ambassador, than for that of the ambassador himself. But on the other hand, if we allow the prince offended a right of punishing a foreign minister, in such a case the subjects

* Wicquefort. ubi supra.

† Tit. Liv. Lib. V. Cap. XXVI, where the historian peremptorily decides, that these ambassadors violated the laws of nations: *Legati contra jus gentium arma capiunt.*

of contest and ruptures betwixt powers will become very frequent; and it is much to be feared that the character of an ambassador would want that safety which is so necessary to it. There are certain practices connived at in foreign ministers, though they be not always very becoming: there are others which are not to be corrected by punishments, but by ordering the minister to depart. How shall these different degrees of trespass be always settled? The intrigues of a minister, against whom there is concerted a design of molesting, will be represented in odious colours; his intentions and proceedings will be calumniated by sinister constructions; even false accusations will be raised against him. In fine, enterprises of this kind are generally attended with precaution, and conducted so clandestinely that a full proof of them is difficult, and scarce ever to be come at but through the formalities of justice; and to these formalities there is no subjecting a minister who is independent of the jurisdiction of the country.

In laying down the grounds of the voluntary law of nations (Prelim. § 21.), we have seen that nations sometimes necessarily, and in regard to the public good, are to recede from certain rights, which, taken in themselves and abstracted from every other consideration, should naturally belong to them. Thus only the sovereign whose cause is just, has in reality all the rights of war (Book III. § 188.); yet is he obliged to look on his enemy as having rights equal with himself, and to treat him conformably (Ibid. § 190, 191.) The same principles must be our rule here. And it must be acknowledged that, in regard to the great usefulness and even necessity of embassies, sovereigns are obliged to respect the inviolability of an ambassador, whilst not incompatible with their own safety and the welfare of their state. Consequently, when the practices of the ambassador have transpired, and his plots are discovered, when the danger is so far off that it may be prevented without laying hands on him, the general right of punishing a traitor, a secret enemy, must be renounced, in consideration of the character; only dismissing abruptly the guilty minister, and requiring further punishment of the sovereign on whom he depends. Indeed this is no more than what most nations, and especially the Europeans, agree in. Wicquefort* gives us several instances of some of the most powerful princes of Europe, who, on discovering ambassadors to be guilty of odious practices, have only ordered them to depart, and sometimes without so much as requiring any punishment from their masters; of whom indeed they had little hopes of obtaining it. To these instances let us add that of the duke of Orleans, regent of France. This prince shewed great moderation towards the prince of Cellemare, ambassador from Spain, who had fomented a dangerous conspiracy against him, only setting a guard over

* Ambassador, Book I. Sect. 27, 28, 29.

the ambassador's house, seizing his papers, and causing him to be conducted out of the kingdom. In the history of Rome we meet with a very remarkable instance of the ambassadors of Tarquin; they came to Rome on pretence of claiming the patrimonial estate of their master, who had been dethroned; but they practised on the profligate young nobility, and drew them into a horrible treason against their country. Though the misbehaviour of these ambassadors rendered them liable to be treated as enemies, yet the consuls and senate spared their persons in regard of the law of nations*. The ambassadors were sent back without any other punishment; but it appears by Livy's account, that the letters which they had from the conspirators to Tarquin were taken from them.

§ 99.
What is
allowable
against
him, ac-
cording to
the exi-
gency of
the case.

This example leads us to the true rule of the law of nations, in the cases now in question. An ambassador cannot be punished, because he is independent; and from the reasons we have allowed, it is not proper to treat him as an enemy, till he himself proceeds to violence and open acts; but whatever the care of averting the evil which he has contrived, and that of defeating his machinations requires, all this may be done against him. If to disconcert and prevent a conspiracy, it were necessary to arrest, or even to put to death, an ambassador who animates and conducts it, I see no cause for hesitation; not only because the safety of the state is the supreme law, but likewise, independently of that maxim, the ambassador's own deeds have given a perfect and particular right of coming to such extremities. The public minister is certainly independent, and his person sacred; but it is unquestionably lawful to repel his attacks, either secret or open, and to defend ourselves against him, whenever he acts either as an enemy or a traitor. And if we cannot save ourselves without his being a sufferer by it, it is he who has laid us under a necessity of not sparing him. It may then be reasonably said, that the minister excludes himself from the law nations. I suppose that the senate of Venice, on detecting the marquis of Bedmar's conspiracy, though convinced that this ambassador was the soul which actuated the whole, wanted other lights for suppressing that horrible design: that they were uncertain about the number and rank of the conspirators, about the design of the conspiracy, and the place where it was to break out; that they doubted whether the fleet or the land forces were to be practised upon for a revolt, or whether some important place was to be surprised. Was it under any obligation to let the ambassador depart at liberty, and thereby give him an opportunity of putting himself at the head of his accomplices, and making a push for carrying his design? This cannot be seriously said. The senate therefore had a right to arrest the marquis and all his family, and

* *Et quamquam missi sunt (legati) commissi, ut hostium loco essent, jus tamen gentium valuit.* Tit. Liv. Lib. II. Cap. IV.

even to extort their detestable secret from them. But these prudent republicans seeing the danger over, and the conspiracy totally suppressed, chose to carry it fair with Spain, by forbidding any one to accuse the Spaniards of having any share in the plot; all they did was to desire the ambassador to withdraw, that he might save himself from the rage of the people.

Here the same rule is to be followed which we have laid down above (Book III. § 136.), in treating of what is allowable against an enemy. Whenever the ambassador acts as an enemy, whatever is necessary for overthrowing his evil designs, and securing ourselves, is allowable against him. From this same principle, and the idea of an ambassador's being a public enemy when he behaves as such, we shall likewise determine his fate, in case he should carry his excesses to the highest degree of guilt. If an ambassador commits such atrocious crimes as affect the safety of mankind, if he undertakes to assassinate or to poison the prince who has received him at his court, he doubtless deserves to be punished as a treacherous enemy, as a poisoner, and an assassin (Book III. § 155.) His character, which he has so basely stained, cannot shelter him from punishment. Is the law of nations to protect a criminal, when the safety of all princes, and the welfare of mankind, call for his punishment? Indeed it is little to be expected that a public minister should run such horrible lengths. Those invested with this character are generally persons of honour; and if there should be found among them any who stick at nothing, the difficulties and greatness of the danger are sufficient to deter them. Yet we are not without instances of these crimes. M. Barbeyrac* relates the assassination of the lord of Sirmium, by an ambassador of Constantine Diogenes, governor of the neighbouring province for Basilus II. emperor of Constantinople, and cites the historian Crenenus. The following fact is likewise to the purpose: Charles III. king of Naples, having, in 1382, sent to his competitor Louis duke of Anjou, a knight, named Matthew Sauvage, in quality of a herald, to challenge him to a single combat; the herald was suspected of carrying a demi-lance, the point of which was thought to be dipped in a poison of such subtilty, that a person looking stedfastly on it, or suffering it merely to touch his cloaths, instantly died. The duke being advised of the danger, not only refused to see the herald, but caused him to be taken into custody; and being examined, he was beheaded on his own confession. Charles complained of the punishment of his herald, as a cruel infraction of the laws and customs of war. Lewis, in his answer, maintained, that by executing the herald, on his own confession, he had not violated the laws of war †. Had the crime imputed to the knight

§ 100.
Of an ambassador who should attempt the prince's life.

* In his Notes on Bynkershoek's Treatise on the Competent Judge of Ambassadors, Chap. XXIV. Sect. 5. Not. 2.

† History of the Kings of the Two Sicilies, by M. d'Egly.

been well proved, the herald would have been an assassin, which no law could protect. But the very nature of the accusation sufficiently shews the falsity of it.

§ 101.
Two remarkable instances concerning the immunities of public ministers.

The question of which we have been treating has been debated in England and France, on two famous occasions. In London, on account of John Lesley bishop of Ross, ambassador from Mary queen of Scotland. This minister was continually intriguing against queen Elizabeth and the tranquillity of the state, forming conspiracies, and exciting the subjects to rebellion. Five of the most able civilians being consulted by the privy council, gave it as their opinion, *That an ambassador raising a rebellion against the prince at whose court he resides, forfeits the privileges of his character, and is subject to the punishment of the law.* They should rather have said, that he should be treated as an enemy. But the council only caused the bishop to be taken into custody, and after keeping him prisoner in the Tower two years, when nothing more was to be feared from his intrigues, he was set at liberty, and obliged to leave the kingdom †. This instance may confirm the principles here laid down; and the like may be said of the following. Brenau, secretary to the Spanish ambassador in France, was surprised treating with Mairargues in a profound peace, to engage him to deliver up Marseilles to the Spaniards. On this he was imprisoned, and the parliament, at the trial of Mairargues, likewise interrogated Brenau; but instead of proceeding to condemn him, sent him to the king, who ordered him to return to his master, and immediately to depart the kingdom. The ambassador warmly complained of the detention of his secretary: but Henry IV. very judiciously answered, *That the law of nations does not forbid putting a public minister under an arrest, in order to hinder him from doing mischief.* The king might have added, that he had the same right of putting in practice against the minister whatever was necessary to preserve himself from the mischief he intended for baffling his projects, and preventing the consequences of them. It was this authorized the parliament to examine Brenau, in order to discover all who had engaged in so dangerous a design. The question whether, if foreign ministers violate the law of nations, they forfeit their privileges, was warmly disputed at Paris. But the king restored Brenau to his master, without waiting for the decision ‡.

§ 102.
Whether reprisals may be used towards an ambassador.

An ambassador is not to be used ill by way of reprisals; for a prince using violence against a public minister, commits a crime which is not to be revenged by an imitation of it. Actions in their own nature unlawful, are never to be committed on pre-

† Camden's Annal. Angl. ad ann. 1571, 1573.

‡ See this dispute, and the discourse which Henry IV. held on this subject to the ambassador of Spain, in the Memoirs of M. Nevers, Vol. II. page 858, and following: in Matthieu, Vol. II. Book III. and other historians.

tence of reprisals; and such unquestionably are any abuse or ill-treatment done to a minister on account of the faults of his master. If it be in general indispensibly necessary to observe this rule in reprisals, the respect due to the character of an ambassador renders it particularly obligatory. The Carthaginians having violated the law of nations, with respect to the ambassadors of Rome, some of the ambassadors of that perfidious people were brought to Scipio, and he was asked, what he would have done to them? *Nothing, said he, that resembles what the Carthaginians have done to us*; and sent them away in safety*. But at the same time prepared to chastise by force of arms, the state which had violated the law of nations†. There cannot be a better pattern for sovereigns to follow on such an occasion. If the injury for which we would use reprisals does not concern a public minister, it is still much more certain, that they are not to be exercised against the ambassador of the power against whom we complain. The safety of public ministers would be very uncertain, did it depend on all the differences that may arise; but there is a case in which it appears very allowable to put an ambassador under an arrest; but care must be taken that this be the only ill-treatment he suffers. When a prince, contrary to the law of nations, has caused our ambassadors to be arrested, we may arrest and detain his as a pledge for the life and liberty of ours. But should this method fail, we should release the innocent ambassador, and do ourselves justice by more efficacious means. Charles V. arrested the ambassador from France, after that kingdom had declared war against him; on which Francis I. did the like to Granville, the emperor's ambassador; but it was at length agreed, that both the ambassadors should be conducted to the frontiers, and released at the same time‡.

We have derived the independency and inviolable character of an ambassador from the natural and necessary principles of the law of nations. These prerogatives are farther conferred on him by custom and general consent. We have seen above (§ 84.) that the Spaniards found the right of embassies established and respected in Mexico, as it is known to be among the Indian nations in North America. If we cast our eye on the other extremity of the earth, we shall see ambassadors respected in China: they are likewise so in India; but indeed less religiously§. The king of Ceylon has sometimes imprisoned the ambassadors of the

§ 103.
Agreement
of nations
concerning
the privi-
leges of am-
bassadors.

* Appian cited by *Georgius*, Lib. II. Cap. XXVIII. Sect. 7. According to *Diodorus Siculus*, Scipio said to the Romans, *Do not imitate what you consider as the reproach of the Carthaginians*: *Συμμιμνήσκω, ὅτι καὶ αὐτοὶ παλαιῶν, ὡς τοῖς Καρχηδονίοις ἐπύλασσον.* *Diod. Sicul. Excerpt. Periegr. p. 290.*

† *Tit. Livy*, Lib. XXX. Cap. XXV. That historian makes Scipio say, "Though the Carthaginians have violated the faith of the truce, and the law of nations, in the person of our ambassadors, I will do nothing against their unworthy of the maxims of the Roman people and of my principles."

‡ *Mezeray's History of France*, Vol. II. p. 470.

§ *General Hist. of Voyages*. Article of China and the Indies.

Dutch East-India company. Being master of the places which produce cinnamon, he knows that the Dutch, in consideration of a profitable commerce, will overlook many things in him, and of this he barbarously takes advantage. The Koran enjoins the muselmén to respect public ministers; and if the Turks have not always conformed to this precept, it is rather to be imputed to the ferocity of some princes than to the principles of the nation. The rights of ambassadors are very well known to the Arabians: an author of that nation relates the following passage: Khaled, an Arabian general, coming in the quality of ambassador to the army of the emperor Heraclius, used insolent language to the general; on which the latter said to him, *That, by the law admitted among all nations, ambassadors were secured from every violence, and that probably he built on this privilege to speak in so indecent a manner* *. It would be quite useless to accumulate here examples taken from the history of European nations; they are innumerable, and the customs in this respect are sufficiently known. St. Lewis, when at Acre, gave a remarkable instance of the safety due to public ministers: an ambassador *from the old man of the mountain, or prince of the assassins*, speaking insolently to him, the grand masters of the knights templars told the minister, *That were it not for the respect of his character, they would immediately cause him to be thrown into the sea* †. The king dismissed him without suffering the least insult to be offered to him; yet as the prince of the *assassins* violated the most sacred laws of nations, no security seemed due to his ambassador; but this security being founded on the necessity of sovereigns preserving the means of reciprocally communicating their proposals, and treating with each other in peace and war, it ought to extend even to the envoys of the princes who, having themselves violated the law of nations, would otherwise be unworthy of any regard.

§ 704.
Of the free
exercise of
religion.

There are rights of another nature, which though not necessarily annexed to the character of a public minister, custom generally attributes to him. One of the principal is the free exercise of his religion. It is indeed highly proper that a minister, and especially a resident minister, should be at liberty freely to exercise his religion within his own house, for himself and his retinue. But it cannot be said, that this right, like independency and an inviolable character, is absolutely necessary to the success of his commission, particularly in the case of a non-resident minister, the only one whom nations are obliged to admit (§ 66.). The minister, in this respect, may do what he pleases within his own walls, into which no body has a right to pry, or to enter. But if the sovereign of the country where he resides, has good reasons for not permitting him to exercise his religion in a manner any way public, this sovereign is not to be blamed, much less ac-

* Alvaredi's History of the Conquest of Syria.

† Ockley's History of the Saracens, Vol. I. p. 294, of the French translation. Choisy's Hist. of St. Lewis.

cused of offending against the law of nations. At present, no civilized country refuses ambassadors their free exercise. For a privilege founded on reason is not to be refused when it is attended with no ill consequence.

Among those rights that are not necessary to the success of embassies, there are some likewise not founded on a general consent of nations; but which are nevertheless, by the custom of several countries, annexed to the character. Such is the exemption from the duties of importation and exportation for things which come into a country for a foreign minister, or which he sends out. There is no necessity for his being distinguished in this respect, since by paying these duties he would not be the less able to discharge his functions. If the sovereign is pleased to exempt him from them, it is a civility which the minister could not claim by any right, no more than that his baggage or any chests, &c. which he sends for from abroad, shall not be searched at the custom-house. Thomas Chaloner, the English ambassador in Spain, sent home a bitter complaint to queen Elizabeth his mistress, that the custom-house officers had opened his trunks in order to search them. But the queen returned him for answer, *That an ambassador was to put up with every thing that did not directly offend the dignity of his sovereign* *.

§ 105.
Whether
an ambaf-
sador be
exempted
from all
imposts.

The independency of the ambassador exempts him indeed from every personal imposition, capitation, or any other duty of that nature, and in general from every impost relating to the quality of a subject of the state. But as for duties laid on any kind of goods or provisions, the most absolute independency does not exempt him from the payment of them: foreigners themselves are subjected to them. This is the rule followed in Holland; the ambassadors are exempted from the duties levied on goods consumed; doubtless because the duties more particularly relate to their persons: but they pay the duties of importation and exportation.

However extensive their exemptions may be, it is manifest that it relates only to things for their use. Should they abuse it, so as to render it a scandalous traffic, by lending their name to merchants, the sovereign has unquestionably a right of putting a stop to the fraud, even by suppressing the privilege. Such things have been known in several places, and the sordid avarice of some ministers, who made a trade of their privilege, has obliged the sovereign to resume them. At present the foreign ministers at Petersburg pay the duties of importation; but the empress has the generosity to make up to them the loss of a privilege which is not their due, and the abolition of which was become necessary by enormous abuses of it.

But here it is asked, whether a nation may abolish what general custom has established with respect to foreign ministers? Let us then consider what obligation custom and received usage can

§ 106.
Of the
obligation
founded on
use and
custom.

* Wicquefort's Ambass. Book I. Sect. 28. towards the end.

lay on nations, not only with regard to ministers, but in every other respect. All the usages and customs of other nations can no further oblige an independent state, than as it has expressly or tacitly consented to them. But when a custom indifferent in itself comes to be once well settled and received, it binds the nations that have tacitly or expressly adopted it. Yet if a nation afterwards perceives any inconveniences therein, it is at liberty to declare its intention of no longer conforming to it. And after giving an explicit declaration of this, no cause of complaint lies against it for any subsequent deviation from that custom which it had formally renounced. But this declaration is to be previously made at a time when it affects no particular nation: it is too late when the case actually exists. It is a maxim generally received, that a law is never to be changed at the time when the case actually subsists. Thus, in the subject before us, a sovereign having previously notified his intentions, and receiving an ambassador only on that footing, may dispense himself from allowing him all the privileges, or paying him all the honours which custom before attributed to his character, provided these privileges and honours be not essential to the embassy, and necessary to its lawful success. To refuse privileges of the last kind, would be the same as refusing the embassy itself, which a state cannot generally and always do, (§ 65.) but only for some very strong reason. To withhold honours accounted sacred, and become in some measure essential, is expressing contempt and doing an injury.

Here it must be further observed, that when a sovereign intends to excuse himself from the future observance of an established custom, the rule must be general. To refuse certain customary honours or privileges to the ambassador of one nation, and to continue the enjoyment of them to others, is an affront to that nation, a mark of contempt, or at least of ill-will.

§ 107. Sometimes princes send to each other a secret minister, whose character is not public. If such a minister be insulted by a person unacquainted with his character, this is no violation of the law of nations; but the prince who receives this ambassador, and acknowledges him to be a public minister, is obliged to protect him, and assist him as far as is in his power, to enjoy all the safety and independency which the law of nations attributes to his character. And Francis Sforza duke of Milan is utterly inexcusable in putting to death Maraviglia, secret minister of Francis I. Sforza had often treated with this secret agent, and had owned him to be the king of France's minister *.

§ 108. We cannot introduce in any more proper place an important question of the law of nations, which is nearly allied to the rights of embassies. It is asked, What are the rights of a sovereign who happens to be in a foreign country, and how the master of the

* See the Memoirs of Martin Du Bellay, Book IV. and father Daniel's History of France, Vol. V. p. 300, and following.

country is to treat him? If this prince be come to negotiate, or to treat about some public affair, he is doubtless to enjoy all the rights of ambassadors in a more eminent degree. If he be come as a traveller, his dignity, abstractively, and the regard due to the nation which he represents and governs, shelters him from all insult, intitles him to every kind of complaisance, friendliness, and regard, and exempts him from all jurisdiction. On his making himself known, he cannot be treated as subject to the common laws, for it is not supposable that he has consented to such a submission; and if a prince will not suffer him in his dominions on such a footing, notice must be sent to him, that he would withdraw; but should this foreign prince form any design against the safety and welfare of the state; in a word, should he act as an enemy, he may very justly be treated as such. Otherwise full security is due to him, it being due to every stranger.

A ridiculous notion has possessed the minds of many, who think they have their share of wisdom; these will have it, that a sovereign coming into a foreign country may be arrested there*. On what reason may such a violence be grounded? It is an absurdity which refutes itself. A foreign sovereign indeed is to give notice of his coming, if he desires to be treated with due security and honour: it would likewise be prudent in him to demand passports, that ill-will may have no pretence or hope left for covering injustice and violence with any specious reasons. I further allow, that as the presence of a foreign sovereign on certain occasions may be of consequence, if the times are in anywise critical, and his journey suspected, he is not to undertake it without the consent of him into whose country he would enter. Peter the Great, when he went into foreign countries in quest of the arts and sciences, for enriching his empire, used to put himself among the retinue of his ambassadors.

A foreign prince unquestionably retains all his rights over his states and subjects, and may exercise them in whatever does not affect the sovereignty of the country where he is. Therefore the king of France appears to have been too suspicious in not suffering the emperor Sigismund, when at Lyons, to create the count of Savoy, who was a vassal of the empire, a duke (See Book II. § 40.) Nothing of this difficulty would have been made towards another prince; but the former claims of the emperors were guarded against even to a scruple. On the other hand, it was with a great deal of reason that in the same king-

* It is surprising to see a grave historian give into this opinion: See Gramond's *Hist. Gall. Lib. XIII.* The cardinal du Richelieu also alledged this false reason, when he caused to be arrested Charles Lewis, the elector palatine, who had undertaken to cross France incognito: he said, "No foreign prince is permitted to pass through the kingdom without a passport." But he added better reasons, drawn from the elector palatine's designs on Brisac and other places, left by Bernard duke of Saxe Weymar, and to which France pretended to have a greater right than any other power, because these conquests had been made with the money furnished by that kingdom. See the *History of the Treaty of Westphalia*, by Father Bougeant, Vol. II. in 12mo. pag. 88.

dom queen Christina's executing one of her domestics within her own house was taken very ill ; an execution of such a nature being an act of territorial jurisdiction. And besides, Christina had abdicated the crown. Her reservations, her birth, her dignity, might indeed intitle her to great honours. But not to an entire independence ; not to all the rights of an actual sovereign. The famous instance of Mary queen of Scotland, so often alledged on this head, is not very apposite. This princess at her coming into England, where she was arrested, tried and condemned, did no longer enjoy the crown.

§ 109.
Of the deputies
of the states.

The deputies sent to the assembly of the states of a kingdom, or a republic, are not public ministers like those we have spoken of, they not being sent to foreign powers : but they are public persons, and in this quality have privileges, which we ought to establish before we take leave of this subject. The states who have a right to meet by deputies, in order to deliberate on public affairs, may on that very account require an entire safety for their representatives, and all the exemptions necessary to the free discharge of their functions. If the persons of deputies be not inviolable, their constituents cannot be assured of their fidelity, in asserting the rights of the nation, and courageously promoting the public welfare. And how could these representatives acquit themselves of their functions, were it allowed to molest them by arrests, either for debts or common trespasses ? There are here, betwixt the nation and the sovereign, the very same reasons on which the immunities of ambassadors betwixt state and state are founded. Therefore it may be said, that the rights of the nation and public faith secure these deputies from violence of any kind, or even from any prejudicial prosecution during the time of their ministry. This is also observed in every other country, and particularly at the diets of the empire, the parliaments of England, and the *cortes* of Spain. Henry the Third of France caused the duke and cardinal de Guise to be killed at the meeting of the states at Blois. Unquestionably the safety of the states was violated by this action ; but those princes were factious rebels, and their audacious views aimed at nothing less than depriving the sovereign of his crown. And if it was equally certain that HENRY was no longer in a condition to bring them to a formal trial, and punish them according to the laws ; the necessity of a just defence constituted the king's right, and vindicates his proceeding. It is the misfortune of weak and short-sighted princes, that they suffer themselves to be reduced to extremities, out of which they are to be extricated only by a palpable violation of all orders and regulations. It is said that Pope Sixtus the Vth, on hearing of the catastrophe of the duke de Guise, commended that resolute act, as a necessary stroke of policy ; but when he was told that the cardinal had likewise been killed, he flew into a flame *. This was carrying his haughty pretensions very far. The pon-

* See the French historians.

tiff readily allowed that urgent necessity authorised Henry's violating the safety of the states, and all the forms of justice; and could he pretend that this prince, rather than be wanting in respect for the Roman purple, should risque both his crown and life?

CHAP. VIII.

Of the Judge of Ambassadors in Civil Cases.

SOME authors are for submitting the ambassador, in civil affairs, to the jurisdiction of the country where he resides; at least for such as have taken rise during the time of the embassy; and in support of their opinion, they alledge, that this subjection does no injury to his character. However sacred, say they, a person be, *his inviolability is not affected by suing him on a civil action*. But it is not on account of the sacredness of their person that ambassadors cannot be sued; it is because they do not depend on the jurisdiction of the country whither they are sent; and the solid reasons for this independency may be seen above (§ 92.) Let us here add, that it is entirely proper, and even necessary, that an ambassador should not be liable to any juridical prosecution, even for a civil cause, that he may not be disturbed in the exercise of his functions. From a like reason it was not allowed among the Romans to summon a priest whilst he was employed in his sacred function*, but at other times he was open to the law. The reason on which this rests is alledged in the Roman law: *Ideo enim non datur actio (adversus legatum), ne ab officio suscepto legationis avocetur †, ne impediatur legatio ‡*. But there was no exception relating to the affairs contracted during the embassy. This was reasonable with regard to those *legati* or ministers, of whom the Roman law here speaks, who being sent only by nations subject to the empire, could not pretend to the independency of a foreign minister. Concerning the subjects of the state, the legislature might prescribe what seemed most proper: but a sovereign has not the like power of obliging the minister of another sovereign to submit to his jurisdiction: and even could he do this by convention, or otherwise, it would not be proper: for under this pretence the ambassador might be often molested in his ministry, and the state become involved in unhappy quarrels, for the trifling concerns of some private persons who might and ought to secure themselves another way. Thus, very agreeably to the duties of nations, and conformably to

§ 110.
The ambassador is exempt from the civil jurisdiction of the country where he resides.

* Nec pontificem (in jus vocari oportet) dum sacra facit. *Digest. Lib. II. Tit. IV. de in jus vocando, Leg. II.*

† *Digest. Lib. V. Tit. I. de Judic. &c. Leg. XXIV.*

‡ *Ibid. Leg. XXVI.*

the great principles of the law of nations, the ambassador or public minister is at present, by the custom and consent of all nations, independent of all jurisdiction in the country where he resides, either for civil or military cases. I know there have been some instances to the contrary; but a few facts do not establish a custom: on the contrary, these, by the censure passed on them, confirm the custom to be as we have said. In the year 1668 the Portuguese resident at the Hague was, by an order of the court of justice, arrested and put in prison for debt. But an illustrious member of that same court * very justly think this procedure unlawful, and contrary to the law of nations. In the year 1657, a resident of the elector of Brandenburg in England was also arrested for debt. But he was set at liberty, the arrest judged contrary to law; and even the creditors and officers of justice concerned in the insult were punished †.

§ 111.
How he
may volun-
tarily sub-
ject himself
to it.

But if the ambassador will partly recede from his independency, and subject himself in civil affairs to the jurisdiction of the country, he unquestionably may, provided it be done with his master's consent. But without such a consent the ambassador has no right to waive privileges in which the dignity and service of his sovereign are concerned; which are founded on the master's rights, and made for his advantage, and not for that of the minister. Indeed the ambassador, without waiting his master's leave, acknowledges the jurisdiction of the country when he makes himself plaintiff in a cause; but this is inevitable; and besides, in a civil cause, on a point of private interest, it has no inconvenience, it being always in the ambassador's breast not to become plaintiff; and if it be requisite he should, he can recommend the prosecution of his cause to a lawyer.

Let us add here by the way, that he is never to be plaintiff for a criminal cause: if he has been insulted, the throne is the place where he is to make his complaint; and the delinquent is to be prosecuted by the public.

§ 112.
Of a minister
subject to the
state where
he is employed.

It may happen that the minister of a foreign power is at the same time a subject of the state where he is employed; and, in this case, as a subject, he is unquestionably under the jurisdiction of the country in whatever does not directly relate to his ministry. But it is required to know in what cases these two qualities of subject and foreign minister become united in the same person. It is not sufficient for this that the minister be born a subject to the state to which he is sent; for unless, by the laws, every citizen is expressly precluded from leaving his country, he may legally have renounced his country, and put himself under a new master. He may likewise, without renouncing his country for ever, become independent of it during the whole time of his being in the service of a foreign prince; and the presumption is certainly in favour of this independence. For the state

* M. de Bynkerhoek's Competent Judge of Ambassadors, Chap. XIII. Sect. 1.
† Ibid.

and functions of a public minister naturally demand that he should depend only on his master (§ 92.); on the prince whose affairs he is negotiating. Therefore, nothing deciding or indicating the contrary, a foreign minister, though subject to the states, is, during the whole time of his commission, reputed to be absolutely independent of it. If his former sovereign is not for granting him this independency in his country, he may refuse to receive him as a foreign minister; as is practised in France, where, according to M. de Callieres *, *the king no longer receives any of his subjects as ministers of foreign princes.*

But a subject of the state may, even in accepting the commission of a foreign prince, remain a subject. His subjection is expressly established when the sovereign acknowledges him as minister, only with a reserve that he shall remain a subject to the state. The states-general of the United Provinces, in a placart of the 19th of June 1681, declare, "That no subject of the state shall be received as ambassador or minister of another power, but on condition that he shall not divest himself of his quality of subject, even with regard to the jurisdiction both in civil and criminal affairs; and that whoever, in making himself known as ambassador or minister, has not mentioned his quality of subject to the state, he shall not enjoy those rights or privileges which are peculiar to the ministers of foreign powers †."

Such a minister may likewise retain his former subjection tacitly, and then, by a natural consequence drawn from his actions, state, and whole behaviour, it is known that he continues a subject. Thus, notwithstanding the declaration above-mentioned, those Dutch merchants who procure to themselves the title of residents of some foreign princes, yet continue in trade, thereby sufficiently denote that they remain subjects. Whatever inconveniencies there may be in the subjection of a minister to the sovereign with whom he resides, if the foreign prince will put up with such inconveniencies, and is contented with a minister on that footing, it is his own doing; and should his minister on any ignominious occasion be treated as a subject, he has no cause of complaint.

It may likewise happen, that a foreign minister makes himself a subject of the power to whom he is sent, by accepting of a post under him; and in this case he can claim independency only in such things as are directly relative to his ministry. The prince who sends him, in allowing of this voluntary subjection, agrees to risqué the inconveniencies that attend it. Thus, in the last century, the baron de Charnace and the count d'Estrades were ambassadors from France to the states-general, and at the same time officers in their high mightinesses army.

The independency of the public minister is the true reason of his exemption from the jurisdiction of the country in which he resides. No juridical action can be directly served on him, as

§ 113.
How the
exemption
of the mi-

* Manner of negotiating with sovereigns, Chap. VI.

† Bynkershoek, *ubi supra*, Chap. XI.

nister extends to his possessions.

he is not subject to the prince or the magistrates. Does this exemption of his person extend itself to all his possessions indiscriminately? For solving this question we must consider what can subject possessions to the jurisdiction of a country, and how they may be exempted. In general, whatever is within the extent of a country is subject to the authority of the sovereign (Book I. § 205. and Book II. § 83, 84.) If any dispute arises concerning effects or goods within the country, or passing through it, it is to be decided by the judge of the place. In virtue of this dependency the method of arrests or seizures has been established in many countries, to oblige a stranger to come to the place where the arrest has been made, in order to answer to any question that may be put to him, though not directly relative to the effects seized. But as we have shewn, a foreign minister is independent of the jurisdiction of the country, and his personal independency as to civil cases would be of no great signification, did it not extend to every thing necessary to his living with dignity, and the quiet discharge of his functions. Besides, whatever he has brought with him, or purchased for his use, as minister, is so connected with his person as to follow its fate. From the independency in which the minister comes, it is not to be supposed that he means to subject his retinue, his baggage, and necessaries, to the jurisdiction of the country. Therefore every thing belonging to the minister's person, as a public minister, whatever is for his use, whatever serves for the subsistence of himself, and that of his household; these, I say, partake of the minister's independency, and are absolutely exempt from any jurisdiction in the country. These things, like the person to whom they belong, are considered as if they were out of the country.

§ 114.
The exemption cannot extend to effects belonging to any trade the minister may carry on.

But this cannot take place in effects manifestly belonging to the ambassador, under another relation than that of minister. What has no affinity with his functions and character, cannot partake of the privileges derived only from his function and character. Should then a minister, as it has been often seen, engage in trade, all the effects, goods, money, and debts, active and passive, belonging to his commerce, come within the jurisdiction of the country. And though these processes cannot be directly addressed to the minister's person, by reason of his independency, he is, by the seizing of the effects belonging to his commerce, indirectly brought to a necessity of answering by such seizure. The abuses arising from a contrary practice are manifest. What could be expected from a merchant, with a privilege of committing in a foreign country all kinds of injustice? There is no manner of reason for extending the exemption of the minister to things of this nature. If the master apprehends any inconveniency from the indirect dependence which his minister thus brings on himself, it is only forbidding him a traffic, which indeed little becomes the dignity of his character.

To what we have said, let us add two illustrations: 1. In case of doubt, the respect due to the character requires that things be
always

always explained to the advantage of that character. I mean, that when there is cause for doubting whether a thing be really for the use of the minister or his household, or whether it belongs to his commerce, the decision must be given on the minister's side, otherwise there would be a risque of violating his privileges.

2. When I say that such effects of the minister, that had no relation to his character, and that belong to his private trade, are seizable, this must be understood with a supposition that it be not for any cause arising from concerns of the minister in his quality of minister; as for things supplied to his house, for rent, &c. For affairs against him under this relation cannot be tried in the country, nor consequently be subjected to the jurisdiction by the indirect way of arrests.

All estates, all immovable goods, depend on the jurisdiction of the country, whoever be the proprietor (Book I. § 205. Book II. § 83, 84.) Are they to be exempted from it only because the owner of them is appointed to be the ambassador of a foreign power? There is no reason for this. The ambassador does not hold those possessions as ambassador; they are not annexed to his person so as, like himself, to be reputed out of the territory. If a foreign prince apprehends any ill consequences from this dependency, in which his minister may be on account of some of his possessions, he may make choice of another. Thus the immoveables possessed by a foreign minister do not alter their nature, by the quality of the owner, and they remain under the jurisdiction of the state where they lie. Every dispute, every process concerning them, is to be carried before the tribunals of the country, which for a just cause may likewise order the seizure of them. It is however easily conceived, that if this ambassador lives in a house of his own, this house is excepted from the rule, as actually serving for his immediate use; except, I say, in whatever may affect the use which the ambassador at that time makes of it.

It may be seen, in M. de Bynkershoek's judicious treatise *, that custom coincides with the principles here laid down, and in the preceding paragraph. In suing an ambassador on any of the two cases just mentioned, that is, with regard to some immoveable lying in the country, or moveable effects, of no relation to the embassy, the ambassador is to be summoned in the same manner as an absent person, he being reputed out of the country; and his independency does not permit any immediate address to his person in an authoritative manner, such as sending an officer of a court of justice to him.

What way is there then of obtaining satisfaction from an ambassador refusing to do justice in any dealings which others may have with him? Many say, that he is to be sued in the tribunal to which he was subject before his embassy. To me this seems something irregular. If the necessity and importance of his functions set him above all prosecution in the foreign country where he

§ 115.
Not to im-
movables
which he
possesses in
the country.

§ 116.
How justice
may be
obtained
against an
ambassador.

* Du Juge competent des Ambassadeurs, Chap. XVI. Sect. 6.

resides, shall it be allowable to molest him by a summons before the courts of his own country? This the good of the public service declares against: the minister must depend solely on the sovereign to whom he belongs, in a manner entirely peculiar; he is an instrument in the hand of the conductor of the nation, of which nothing is to divert or obstruct the service. Neither would it be just that the absence of a person charged with the interests of the sovereign and the nation, should hurt his private affairs. Every where, in all countries, they who are absent on the service of the state have privileges which secure them from any inconveniencies during their absence. But these privileges of the ministers of the state should, as far as possible, be so modelled and tempered, as not to be productive of any considerable damage or inconveniency to private persons who have dealings with them. How then are the different interests, the service of the state, and the administration of justice, to be reconciled? All private persons, citizens or strangers, who have any demands on a minister, if they cannot obtain justice, from himself, should apply to the sovereign his master, who is obliged to do them justice, in a manner most agreeable to the public service. The prince is to consider whether it be fit to recall his minister, to appoint a tribunal before which he may be sued, or to order delays, &c. In a word, the good of the state does not allow that any person whatever should disturb the minister in his functions, or divert him from them, without the sovereign's leave; and the sovereign, his supreme duty being obliged to do justice to all, ought not to countenance his minister in refusing it, or wearying out his adversaries by unjust delays.

C H A P. IX.

Of the Ambassador's House and Domestics.

§. 117.
Of the am-
bassador's
house.

THE independency of the ambassador would be very imperfect, and his security weakly founded, did not the house in which he lives enjoy an entire exemption, so as to be inaccessible to the ordinary officers of justice. The ambassador might be disturbed under a thousand pretences; his secrets might be discovered by searching his papers, and his person exposed to insults. Thus all the reasons which establish his independence and inviolability, concur likewise to secure the freedom of his house. The right of the character is generally acknowledged in all civilised nations: an ambassador's house is, at least in all the common cases of life, like his person, considered as out of the country. Of this, a few years ago there was a remarkable instance at Petersburg: Thirty soldiers, with an officer at their head, on the 3d of April

1752,

1752, entered the house of baron Greiffenheim the Swedish minister, and carried away to prison two of his domestics, for having clandestinely sold liquors; this being a privilege limited to the imperial farm. The court, incensed at such a proceeding, caused the authors of the violence to be immediately taken into custody, and the empress ordered satisfaction to be made to the offended minister; she likewise sent to him and other foreign ministers, a declaration, expressing her concern and resentment at what had happened, with the orders which she had given to the senate for prosecuting, as the chief delinquent, the commissioner of the office erected for hindering the clandestine sale of liquors.

The house of an ambassador is to be defended from all outrage, under the particular protection of the law of nations, and those of the country: to insult it is a crime both against the state and all other nations.

But the immunity and freedom of the ambassador's house is established only in favour of the minister and his domestics; which is evident from three reasons it is grounded upon. May he avail himself of it for making his house an asylum, and sheltering the enemies of the prince, and malefactors of every kind, and thus secure them from the punishments which they have deserved? Such proceedings would be contrary to all the duties of an ambassador, to the spirit with which he should be animated, and to the lawful views on which he has been admitted. This is beyond doubt; but this is not all, and it may be laid down as a certain truth, that a sovereign is not obliged to tolerate an abuse so pernicious to his state, and so detrimental to society. As for some common trespasses of people, often rather unfortunate than criminal, or whose punishment is of no great importance to the tranquillity of society; the house of an ambassador may indeed serve as an asylum to such, and it is better that delinquents of this kind should be suffered to escape, than to expose the ambassador to frequent molestations, under pretence of a search after them, and thus involve the state in any difficulties which might arise from such proceedings. And an ambassador's house being independent of the ordinary jurisdiction, no magistrate, justices of peace, or rather subordinate officers, are in any case to enter it by their own authority, or to send any of their instruments, unless it be on occasions of pressing necessity, where the public welfare is in danger, and which admits of no delay. Whatever concerns a point of such weight and delicacy; whatever affects the right and glory of a foreign power; whatever may embroil the state with that power, is to be laid immediately before the sovereign, and regulated by himself, or on his orders, by his council of state. Thus a sovereign is to determine how far the right of asylum, which an ambassador attributes to his house, is to be regarded; and if the delinquent be such that his detention or punishment is of great importance to the state, the prince is not to be withheld by the consideration of a privilege which was never given for the

§ 118.
Of the right
of asylum.

detriment and ruin of states. In the year 1726, the famous duke de Ripparda having sheltered himself in the house of lord Harrington, ambassador from England, the council of Castille decided, "That he might be taken out of it, even by force; since, otherwise, what had been settled for maintaining a more connected correspondence betwixt sovereigns, would, on the contrary, turn to the ruin and destruction of their authority. Thus were the privileges granted to the houses of ambassadors merely for common trespasses, extended to the subjects, who had been depositories of the finances, forces, and secrets of the state, when they had failed in the duties of their ministry; it would be introducing a usage, of all others the most pernicious, and the most detrimental to all the powers on earth; who, according to this maxim, would be found not only to suffer, but even to see supported, at their court, all who were contriving their destruction *." Nothing could be said on this head with greater truth and judgment.

The abuse of exemption has no where been carried farther than at Rome, where the ambassadors of crowned heads claim it for the whole ward in which their house stands. The popes, once so formidable to sovereigns, have for above two centuries been in their turn under a necessity of dealing tenderly with them. It is in vain they have endeavoured to suppress, or at least to reduce within proper limits, an abusive privilege, for which the most ancient custom is no valid plea against justice and reason.

§ 119.
Exemption
of an am-
bassador's
coaches.

An ambassador's coaches and carriages are equally privileged with his house, and for the same reasons: to insult them is an attack on the ambassador himself, and the sovereign whom he represents. They are independent of all subordinate authority; no guards, commissioners, magistrates, or their instruments, are to stop and search them without a superior order; but here, as with regard to the house, the abuse is not to be confounded with the right. It would be absurd that a foreign minister should have the power of conveying off in his coach a criminal of importance, whom it highly concerned the state to secure, and this under the very eyes of the sovereign, who thus would see himself defied in his own kingdom and court. Where is the sovereign who would suffer this? The marquis de Fontenay, ambassador from France at Rome, sheltered the Neapolitan exiles and rebels, and at last was for carrying them out of Rome in his coaches; but at the city gates the coaches were stopped by some Corsicans of the pope's guard, and the Neapolitans conveyed to prison. The ambassador sharply complained of it; but the pope answered, "That he had given orders for seizing those whose escape the ambassador had favoured; that since he took the liberty of protecting villains and criminals of all kinds, within the ecclesiastical state, he who was sovereign should at least be al-

* Memoires de M. l'Abbé de Montgon, T. I.

"lowed

"lowed to lay hold of them again whenever they could be met with; *as the rights and privileges of ambassadors were not to be carried to such a height.*" The ambassador replied, "That it would not appear he had harboured the pope's subjects, but only some Neapolitans, whom he might very lawfully shelter from the persecutions of the Spaniards *." This minister, in his answer, tacitly allowed, that had he made use of his coaches for the escape of any of the pope's subjects, and for screening delinquents from justice, he could not reasonably have complained of their being stopped.

The persons in an ambassador's retinue partake of his inviolability; his independency extends to all his household; these persons are so connected with him, that they follow his fate. They depend immediately on him only, and are exempt from the jurisdiction of the country, into which they would not have come, but with this reserve. The ambassador is to protect them, and whenever they are insulted, it is an insult on himself. Did not the domestics and household of a foreign minister solely depend on him, it is known how very easily he might be molested and disturbed in the exercise of his functions. These maxims, at present, are every where received and confirmed by custom.

The ambassador's consort is intimately united to him, and more particularly belongs to him than any other person of his household. Accordingly she shares his independency, and inviolability; even distinguished honours are paid her, which in some measure could not be denied her without affronting the ambassador. For these, most courts have a fixed ceremonial. The regard due to the ambassador communicates itself likewise to his children, who also partake of his immunities.

The ambassador's secretary is one of his domestics, but the secretary of the embassy has his commission from the sovereign himself, which makes him a kind of public minister, and he, in himself, is protected by the law of nations, and enjoys immunities independent of the ambassador; to whose orders he is indeed but imperfectly subjected, sometimes not at all, and always according to the determination of their common master.

Couriers sent or received by an ambassador, his papers, letters, and dispatches, all essentially belong to the embassy, and consequently are to be sacred; as without a regard to them the embassy could not obtain its lawful ends, nor the ambassador discharge his functions with proper security. The states-general of the United Provinces have decided, whilst the president Jeannin resided with them as ambassador from France, that to open the letters of a public minister was a breach of the laws of nations†. Other instances may be seen in Wicquefort. Notwithstanding this privilege, on momentous occasions, when the ambassador himself has violated the law of nations, by form-

* Wicquefort's Ambassador, Book I. § 18. towards the end.

† Wicquefort's Book I. § 27.

ing or countenancing plots or conspiracies against the state, his papers may be seized, for discovering the whole secret, and knowing the accomplices; on such an exigency, he may be personally put under an arrest, and interrogated (§ 99.). This was done to the letters which some traitors to their country had delivered to Tarquin's ambassador (§ 98.).

§ 124.
The am-
bassador's
authority
over his
retinue

The persons of a foreign minister's retinue being independent of the jurisdiction of the country, cannot be taken into custody or punished without his consent; yet were it highly improper that they should enjoy an absolute independency, and be at liberty confidently to run into all manner of licentiousness. The ambassador is necessarily invested with all the authority necessary for keeping them in order: some will have this authority to include even life and death. When the marquis de Rosny, afterwards duke de Sully, was in England, as ambassador extraordinary from France, a gentleman of his retinue committed a murder, which caused a great noise among the people of London. The ambassador assembled some French noblemen who had attended him, tried the murderer, and sentenced him to lose his head. He then acquainted the lord mayor of London that he had tried the criminal, and desired officers and an executioner: but afterwards consented to deliver up the criminal to the English, that they might proceed as they thought proper; and M. de Beaumont, the French ambassador in ordinary, the young gentlemen being his relation, prevailed on the king of England to pardon him *. It lies in the sovereign's breast to extend the ambassador's power over his retinue to such a degree; and the marquis de Rosny was thoroughly assured of his master's approbation; but in general the ambassador is to be supposed to have only a coercive power, so that he may keep his dependents in order, by confinement and other penalties, such as are not capital or infamous. He may punish the faults committed against himself and his master's service, or send the delinquents to their sovereign, in order to their being punished. But should his people become guilty towards society, by crimes deserving a severe punishment, the ambassador is to distinguish between the domestics of his own nation and those belonging to the country where he resides. The shortest and most natural way with the latter is to cashier them, that they may be delivered into the hands of justice. As to those of his nation, if they have offended the sovereign of the country, or committed any of those atrocious actions, the punishment of which concerns all nations, and whom for that reason it is usual among nations to claim and deliver them up; why should he not give them up to the nation requiring their punishment? If the fault be of another kind, he is to send them back to their sovereign. In fine, where the case is dubious, the ambassador is to keep the criminal in irons till he receives orders from his court. But if he passes a capital sentence on the crimi-

* Sully's Memoirs, Vol. I. Chap. I.

nal, I do not think he can execute it within his house; an execution of this nature being an act of territorial superiority belonging only to the sovereign of the country. And if the ambassador, together with his house and household, be reputed out of the country, it is but a mode of expressing his independency, and all the rights necessary to the lawful success of the embassy. This fiction cannot imply privileges reserved to the sovereign, too tender and important to be communicated to a stranger, and not necessary to the ambassador for the worthy discharge of his embassy. If the offence be against the ambassador, or against the service of his master, the ambassador may send the delinquent to his sovereign. If the crime concerns the state where the minister resides, he may try the criminal, and, on finding him guilty of death, he is to give him up to the justice of the country, as did the marquis of Rosny.

When the commission of an ambassador is at an end; when he has terminated the affairs which brought him; when he is recalled or dismissed; in a word, when he is obliged to go away on any account whatever, his functions cease; but his privileges and rights do not expire at the same time: he retains them till his return to his principal, to whom he is to make a report of his embassy. His safety, his independence, and inviolability, are not less necessary to the success of the embassy in his return, than at his coming. Accordingly, when an ambassador departs by reason of a war kindling between his master and the sovereign at whose court he was negotiating, a sufficient time is allowed him for his safe departure. And if he returns by sea, and should happen to be taken in the passage, he would be immediately released, as he could not lawfully be detained. § 125. When the rights of an ambassador end.

For the same reasons the ambassador's privileges subsist even when the activity of his ministry becomes suspended, and he stands in need of fresh powers. This case happens by the death of the prince whom the minister represents, or of the sovereign at whose court he resides. On either occasions the minister must have fresh credentials. Though it is less necessary in the latter case than in the former, especially if the successor of the deceased prince be the natural and necessary successor; because the authority whence the minister's power flowed, still subsisting, it is easily conceived that he remains in the same quality with the new sovereign; but if the minister's master is no more, his powers expire, and the successor's credentials are absolutely necessary for authorising him to speak, and act in his name. Yet he continues during the interval the minister of the nation, and as such he is to enjoy the rights and honours annexed to that character. § 126. Of the cases when credential letters are necessary.

At length I have reached the end of my proposed career. I do not pretend to have given a perfect, full, and complete treatise of the law of nations; it was not indeed my design, and in so vast and rich a subject, it would have been presuming too much on my abilities. I shall think I have done a great deal, if my principles § 127. Conclusion.

principles are approved by intelligent persons, as solid, luminous, and sufficient to give a proper solution of the questions that arise in particular cases. I shall be happy if my labours may be of some use to those men in power, who love mankind and revere justice; if they furnish them with arms for defending what is right, and for compelling the unjust, to observe at least, some measures, and to keep within the bounds of decency!

FINIS.

